

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1930

No. 5236

884

L. J. CHRISTOPHER COMPANY OF DELAWARE,
APPELLANT,

DAVID BURNET;

vs.

COMMISSIONER OF INTERNAL REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

FILED JUNE 14, 1930.

PRINTED OCTOBER 13, 1930.

Court of Appeals of the District of Columbia

APRIL TERM, 1930

No. 5236

L. J. CHRISTOPHER COMPANY OF DELAWARE,
APPELLANT,

vs.

COMMISSIONER OF INTERNAL REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

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Court of Appeals of the District of Columbia

No. 5236.

L. J. CHRISTOPHER COMPANY OF DELAWARE, Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE.

1

Docket No. 17448.

L. J. CHRISTOPHER COMPANY OF DELAWARE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Appearances:

For Taxpayer: Geo. E. H. Goodner, Esq.

For Comm'r: Geo. H. Koster, C. P. A.; I. R. Blaisdell, Esq.; H. D. Thomas, Esq.; J. M. Hudson, Esq.

Docket Entries.

1926.

June 15. Petition received and filed.

“ 18. Copy of petition served on Solicitor.

“ 18. Notification of receipt mailed taxpayer.

July 15. Answer filed by Solicitor.

Aug. 24. Copy of answer served on taxpayer. Assigned
to General Calendar.

1927.

Mar. 3. Notice of hearing May 2, 1927, Los Angeles, Calif.

“ 7. Motion to place on Reserve Calendar filed by taxpayer.

“ 11. Application for order to take depositions filed by taxpayer.

- Mar. 12. Order to take depositions, signed and filed. Both sides notified.
- “ 12. Order to strike from Circuit Calendar and restored to General Calendar signed and filed. Both sides notified.
- May 9. Depositions of Mr. Hookstratten, et al., filed.
- “ 10. Copy of depositions served on G. C.
- “ 26. Motion to suppress depositions filed by G. C. Copy served 5-28-27.
- Aug. 17. Motion to place on Circuit Calendar, Los Angeles, filed by taxpayer.
- “ 17. Granted. Both sides notified.
- 1928.
- Mar. 7. Hearing date set 4-17-28, Los Angeles, Calif.
- “ 8. Notice of appearance of Geo. E. H. Goodner as counsel for taxpayer filed.
- “ 16. Motion to limit hearing to the issues of Rule 62. Granted.
- Apr. 17. Hearing had before Mr. Milliken on merits. Briefs June 15, 1928, due.
- May 11. Transcript of hearing filed 4-17-28.
- June 14. Brief filed by G. C. See 8931.
- “ 15. Brief filed by taxpayer. See 8931.
- Oct. 2. Findings of fact and opinion rendered (Milliken) Judgment will be entered under Rule 50.
- 1929.
- Jan. 15. Notice of settlement filed by G. C. See 8931.
- “ 17. Hearing set Feb. 13, 1929.
- Feb. 5. Proposed alternative redetermination filed by taxpayer. Copy served 2-7-28.

- Feb. 13. Hearing had before Mr. Millikin contested settlement under Rule 50.
- “ 15. Order of redetermination entered.
- “ 16. Transcript of hearing 2-13-29 filed.
- Aug. 14. Stipulation of venue filed. Court of Appeals of D. C.
- “ 14. Petition for review by Court of Appeals of D. C. with assignments of error filed by taxpayer.
- “ 14. Proof of service filed.

- Oct. 12. Motion to enlarge time to 12-1-29 to prepare evidence and transmit record filed by taxpayer.
- “ 12. Order enlarging time to 12-2-29 for preparation of evidence and delivery of record, entered.
- Nov. 29. Motion for enlargement to 1-15-30 for preparation of evidence and delivery of record filed by taxpayer.
- “ 30. Order enlarging time to Jan. 15, 1930 for preparation of evidence and transmission and delivery of record, entered.
- 1930.
- Jan. 14. Motion to enlarge time to prepare evidence and transmit record to 2-15-30 filed by taxpayer.
- “ 14. Order enlarging time to Feb. 15, 1930 for preparation of evidence and delivery of record sur petition for review entered.
- “ 22. Statement of evidence lodged.
- “ 22. Proof of service of statement of evidence and notice of hearing February 5, 1930 filed.
- Feb. 3. Objections to statement of evidence filed by G. C.
- “ 5. Hearing had before Mr. Sternhagen Div. 10 on settlement of evidence—objected to by respondent—continued for hearing on settlement to March 27, 1930.
- “ 5. Order of continuance to March 27, 1930 on approval of statement of evidence entered.
- “ 10. Motion for extension to May 1, 1930 for preparation of evidence and transmission of record, filed by taxpayer.
- “ 11. Order enlarging time to May 1, 1930 for preparation of evidence and transmission and delivery of record, entered.
- Mar. 8. Motion to advance hearing date for settlement to March 20, 1930, filed by taxpayer.
- “ 10. Motion to advance hearing granted.
- “ 13. Objections to statement of evidence filed by G. C.
- “ 12. Transcript of hearing 2-5-30 filed.
- “ 20. Hearing had on settlement of evidence. Assigned to Mr. Marquette.
- Apr. 16. Order that respondent's objections to statement of evidence be allowed, entered.
- “ 14. Transcript of hearing of 3-20-30 filed.

Apr. 30. Motion for enlargement of time to June 1, 1930 to prepare and deliver record filed by taxpayer.

“ 30. Order enlarging time to June 2, 1930 for preparation of evidence and delivery of record sur petition, entered.

May 14. Agreed statement of evidence approved and ordered filed.

“ 16. Præcipe filed, Proof of service thereon.

“ 29. Order enlarging time to July 1, 1930 for transmission and delivery of record entered.

Now, June 9, 1930, the foregoing docket entries certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

3 Filed Jun. 15, 1926, United States Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 17448.

L. J. CHRISTOPHER COMPANY OF DELAWARE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition.

The above named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:SM-60D, JRM-D-25761) dated April 24, 1926, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation incorporated under the laws of Delaware with its principal office at 2101 South Los Angeles Street, Los Angeles, California.

2. The notice of deficiency, a copy of which is attached and marked “Exhibit A” was mailed to petitioner on April 24, 1926.

3. The taxes in controversy are income and profits taxes for the period February 16 to December 31, 1921 and for \$20,210.94.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The erroneous conclusion that the invested capital of the petitioner could be determined.

(b) The erroneous conclusion that there were present during the period in the income and invested capital of the petitioner no abnormal conditions which would justify the bureau in computing the profits tax of petitioner under the provisions of Section 328 of the Revenue Act of 1921.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The profits tax of your petitioner is high.

(b) There were present during the period in question abnormal conditions affecting both income and capital which caused an undue hardship on the petitioner and for the relief of which the special relief provisions of the Revenue Act aforesaid intended to apply.

(c) A mixed aggregate of tangible and intangible property was acquired and the valuation thereof cannot be satisfactorily determined.

4 (d) The income reflected for the taxable year was to a large extent the result of the activities of prior years and not normally reflected in invested capital.

6. The petitioner prays for relief from the deficiency asserted in the following particular:

That the profits tax of petitioner for the period February 16th to December 31st, 1921 be determined under Section 328 of the Revenue Act of 1921, and for such other and proper relief as may seem to the Court to be proper.

Wherefore petitioner prays that this Board may hear and redetermine the deficiency herein alleged.

GEORGE R. JACKSON,

GEORGE R. JACKSON,

420 Union Trust Building,

Washington, D. C.,

Counsel for Petitioner.

STATE OF CALIFORNIA,

County of Los Angeles, ss:

S. C. Hookstratten, being duly sworn says that he is Secretary of the L. J. Christopher Co. of Delaware above named, that he is duly authorized to verify the foregoing petition; that he has read the same and is familiar with the statements contained therein and that the said facts stated are true.

[Seal L. J. Christopher Company, Delaware, Incorporated 1921.]

S. C. HOOKSTRATTEN.

Subscribed and sworn to before me this 8th day of June, 1926.

[Seal of William A. Taylor, Notary Public, Los Angeles Co., Cal.]

WILLIAM A. TAYLOR,
Notary Public.

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Aug. 18, 1927.

5 IT:E:SM-60D. JRM-D-25761.

April 24, 1926.

L. J. Christopher Company of Delaware,
2101 South Los Angeles Street,
Los Angeles, California.

SIRS:

An audit of your income and profits tax return for the period February 16, to December 31, 1921, has resulted in the determination of a deficiency in tax of \$20,210.94, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be

mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM-60D, JRM-D-25761. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner,

By ————,
Assistant to the Commissioner.

Enclosures: Statement, Waiver—Form A.
Form 882, EMS-1.

6

Statement.

IT:E:SM-60D. JRM-D-25761.

April 24, 1926.

In re L. J. Christopher Company of Delaware, 2101 South
Los Angeles Street, Los Angeles, California.

Period.	Deficiency in tax.
February 16 to December 31, 1921.....	\$20,210.94

Further explanation of the adjustment is shown in Bureau letter dated May 3, 1924.

After a careful review of your protest and of all the evidence submitted in support of your contentions at conference held March 17, 1926 you are advised that the Bureau holds that (1) your invested capital can be determined, and (2) the evidence presented fails to establish that your invested capital or net income is affected by abnormal conditions which would justify the Bureau in computing your profits tax under the provisions of Section 328 of the Revenue Act of 1921.

The deficiency in tax of \$20,210.94, of which you were advised in Bureau letter dated December 19, 1925, is therefore sustained.

A copy of this communication is being forwarded to your representative, Mr. George R. Jackson, 819-15th Street, N. W., Washington, D. C.

Now, June 9, 1930, the foregoing petition certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

EMS-1.

7 Filed Jul. 15, 1926, United States Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 17448.

Appeal of L. J. CHRISTOPHER CO. OF DELAWARE, Los Angeles, California.

Answer.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1.
2. Admits the allegations contained in paragraph 2.
3. Admits the allegations contained in paragraph 3.

4. Denies that the Commissioner committed error as alleged in paragraph 4.

5. Specifically denies each and every allegation contained in paragraph 5.

Wherefore it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

GEORGE G. WITTER,
Special Attorney,
Bureau of Internal Revenue.

Now, June 9, 1930, the foregoing answer certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

8 United States Board of Tax Appeals.

Docket No. 17448.

L. J. CHRISTOPHER COMPANY OF DELAWARE, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Excerpt from Transcript of Hearing April 17-18.

(Line 9, page 12, to and including line 5, page 13, and first seven lines page 14.)

Mr. Goodner: Now, the petitioner in the Delaware case raises two questions, or two errors: One is the erroneous conclusion that the invested capital of the petitioner could be determined; the other is the erroneous conclusion that there were present during the period no abnormal conditions which would justify the Board in computing the profits tax of the petitioner under the provisions of Section 328

of the Revenue Act of 1921. In other words the petitioner contends in this petition that it is entitled to have its profits tax for 1921 computed under the provisions of Section 328 of the 1921 Act; the Commissioner has refused to do this, and denies that it is entitled to that privilege.

I desire at this time to offer an amendment to the petition of the Delaware company by adding another error, as follows:

Paragraph (4) (c):

“The Commissioner has erroneously excluded from invested capital any amount for good will acquired by the Delaware company, at the time of the organization and purchase of the assets of the California company.”

* * * * *

Mr. Blaisdell: The Commissioner objects to the allowance of the proposed amendment at this time, for the reason that it injects an entirely new issue into this case and takes the Commissioner by surprise. The Commissioner is not prepared to meet this issue at this time.

The Member: Objection overruled and exception noted. Does that conclude your opening statement?

Now, June 9, 1930, the foregoing excerpts from transcript of hearing certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

9 United States Board of Tax Appeals.

Docket No. 17448.

L. J. CHRISTOPHER COMPANY OF DELAWARE, Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Excerpt from Transcript of Hearing April 17-18.

(Page 18, line 5, to line 19, inclusive.)

Mr. Goodner: I desire to amend the petition of the Delaware company by adding a new paragraph to be numbered (d) (4), I believe it is, reading as follows:

“The Commissioner is attempting to assess a tax against the L. J. Christopher Company of Delaware after the statute of limitations had run against such assessment.”

And in support of that amendment, I desire to call attention to the fact that the sixty-day letter sent to the Delaware company is dated April 24, 1926, more than four years after the filing of the return of the Delaware company, and the Commissioner is without a valid waiver authorizing the assessment at that time.

The Member: I will likewise allow that amendment, and note an exception in the record for the Respondent.

Now, June 9, 1930, the foregoing excerpt from transcript of hearing certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

10 Filed Mar. 16, 1928, United States Board of Tax
Appeals.

United States Board of Tax Appeals.

Docket No. 17448.

L. J. CHRISTOPHER COMPANY OF DELAWARE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Motion.

Comes now the respondent by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and states:

That the above-entitled appeal has been set for hearing on Tuesday, April 17, 1928, at Los Angeles, California.

That the appeal involves the question of special assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1921.

Wherefore respondent moves that an order be made limiting the issues to be tried, at the aforesaid time and place,

to the issues defined in subdivisions (a) and (b) of Rule 62 of the Board of Tax Appeals.

(Signed)

C. M. CHAREST,
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

IRWIN R. BLAISDELL,
Special Attorney,
Bureau of Internal Revenue.

Now, June 9, 1930, the foregoing motion and order certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

IRB-crp.

Granted Mar. 16, 1928.

(Signed)

B. H. LITTLETON,
Member U. S. Board of Tax Appeals.

11 United States Board of Tax Appeals.

Docket Nos. 8931, 16085 and 17448.

L. J. CHRISTOPHER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

L. J. CHRISTOPHER COMPANY OF CALIFORNIA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

L. J. CHRISTOPHER COMPANY OF DELAWARE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Promulgated October 2, 1928.

Certain withdrawals from a corporation made by a stockholder who owned all the stock of the corporation except certain qualifying shares, held to be taxable dividends under Section 201 of the Revenue Act of 1921.

In the absence of evidence showing when income tax returns were filed, *held*, that the assessment of a deficiency is not barred by the statute of limitations.

The value of the good will of a corporation determined.

Right to special assessment under Section 328 of the Revenue Act of 1921 denied where the only facts established in evidence are the amount of income and the amount of invested capital of petitioner as determined by respondent.

George E. H. Goodner, Esq., for the petitioner.

George H. Koster, C. P. A., and *I. R. Blaisdell, Esq.*, for the respondent.

The above proceedings were consolidated for hearing and decision and all involve deficiencies in tax for the year 1921. In the proceeding of L. J. Christopher, the deficiency is \$89,501.52. In the proceeding of L. J. Christopher Com-

pany of California, hereafter referred to as California Company, the deficiency is \$6,227.17, and in the proceeding of L. J. Christopher Company of Delaware, hereafter referred to as Delaware Company, the deficiency is \$20,210.94. Petitioner, L. J. Christopher, asserts that respondent erred—(a) in holding that petitioner was in receipt of a

taxable dividend in the amount of \$192,872.67 and

12 (b) in refusing to hold that petitioner received said amount as trustee for California Company. Petitioner

California Company asserts—(c) that the assessment of any additional tax is barred by the statute of limitations;

(d) that there was no actual sale by California Company to Delaware Company, upon which a profit was realized;

(e) that the transaction between said companies constituted a reorganization which did not result in taxable gain;

(f) that respondent in computing the profit on the alleged sale by California Company to Delaware Company erroneously excluded from cost the value of good will acquired

by that company in exchange for its capital stock and in including in gain the amount of \$12,093.46. Petitioner,

Delaware Company, asserts (g) that the assessment of the additional tax is barred by the statute of limitations;

(h) that respondent erred in holding that petitioner's invested capital could be determined; (i) that respondent erroneously concluded that there were present during the

year 1921, in the income and invested capital of said company no abnormal conditions which would justify him in

computing the profits tax of petitioner under the provisions of Section 328 of the Revenue Act of 1921; and (j) that

respondent erroneously excluded from said petitioner's invested capital the value of good will acquired by it at the

time of its organization and the purchase of the assets of California Company.

Findings of Fact.

L. J. Christopher entered the wholesale and retail ice cream, candy and confectionery business in the year 1887, in Los Angeles, California, with a capital of approximately \$50,000. The business was successful and steadily increased

in value. Prior to the year 1914, he had acquired

13 certain real estate and had built thereon an extensive plant. The sales grew in volume and by 1914,

he was selling ice cream in many of the surrounding towns and cities. In 1912, he registered his name as trade mark. By 1914, his annual sale of ice cream amounted to approximately 200,000 gallons. In 1914 he organized California Company under the laws of California with a capital stock of \$400,300, and transferred to it all of the assets of the business including the good will, in consideration of all of its capital stock except a few qualifying shares. Immediately upon its organization, California Company set up on its books, the following statement of its assets and liabilities:

L. J. Christopher Company, Los Angeles.

Statement of Assets and Liabilities, June 1, 1914.

Cash Assets.		
1. Revolving Funds.....	\$152.00	
3. Citizens National Bank.....	1,615.41	
		\$1,767.41
Current Assets.		
9. Accounts Receivable.....	\$29,984.75	
10. Notes Receivable.....	1,838.06	
11. Accounts Receivable (Anaheim Store) (C. R. Alling)	2,958.50	
12. Stock Subscription.....	300.00	
		35,081.31
Inventory Assets.		
17. Warehouse	18,744.50	
18. Factory Work in Process.....Cdy. \$2,686.22		
IC. 3,163.11		
	5,849.33	
19. Factory Manufactured Stock.....Cdy. \$948.91		
IC. 1,772.59		
	2,721.50	
20. Store Stock.....	7,404.62	
		34,719.95
14	Property Assets.	
27. Real Estate.....	200,000.00	
28. Buildings	51,023.16	
30. Outside Investments.....	1,212.00	
		252,235.16
Equipment Assets.		
36. Cafe and Store Furniture and Fixtures.....	\$39,286.04	
37. Factory Machinery and Equipment.....	43,160.41	
38. Office Furniture and Fixtures.....	1,722.80	
39. Delivery Equipment.....	20,741.30	
40. Tubs and Cabinets.....	10,581.49	
42. Dish Room Stock.....	7,433.77	
		122,925.81

Deferred Assets.

	Detail.	Total.
47. Advanced Expenses.....	1,201.72	
49. Unexpired Insurance.....	1,318.05	
50. Delivery Department Supplies.....	502.50	
53. Good Will.....	17,028.82	
		20,051.09
Total assets.....		\$466,780.73

Liabilities.

Current Liabilities.

57. Accounts Payable.....	\$19,126.34	
58. Notes Payable.....	10,000.00	
		\$29,126.34

Reserve Liabilities.

55. Reserve for Depreciation.....	37,354.39
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Capital Liabilities.

72. Capital Stock.....	400,300.00
------------------------	------------

Total liabilities..... \$466,780.73

The actual cash value of the good will of the business of L. J. Christopher acquired by California Company was \$17,028.82. L. J. Christopher was at all times president of the California Company and the owner of all its shares of stock except the qualifying shares, and certain small blocks of stock held by employees all of which were taken over by L. J. Christopher prior to the sale hereafter referred to for par and interest on such par value at the approximate rate of seven per cent. From the date of its incorporation down to and including the year 1924, California Company made no formal declaration of dividend. During said period, L. J. Christopher withdrew from the earnings of California Company from time to time, moneys and other personalty. These amounts were charged against him on the books of California Company. The private account of L. J. Christopher as it appears on the ledger of California Company shows that as of February 28, 1920, said Christopher was charged with the sum of \$843.36 and that during the remainder of that year he withdrew in cash and other items, \$46,270.92 and that these withdrawals were credited by salary in the amount of \$11,000 and other items amounting to \$1,769.75, leaving a balance charged against him as of December 31, 1920 of \$34,344.53. The private account of L. J. Christopher as it appears from the ledger of California Company for the period January 1, 1921 to December 31, 1923, inclusive, is as follows:

L. J. Christopher Company, Los Angeles.

Date.	Description.	Post ref.	Charges.	Credits.	Dr. or credit.	Balance, amount.
	Amounts forwarded	.....	\$34,344.53	.....	.....	\$34,344.53
1/31/21.	Cash Record	R. 6	13,515.55			
"	A. P.	R. 1	1.25			
"	Salary, Jan.	J. 727 B	47,861.33	\$1,000.00	.....	46,861.33
2/28/21.	Cash Record	R. 6	20,095.60			
"	P. R.	R. 2	7.88			
"	Sundry	J. 737 A	.....	500.00	.....	.....
		.....	67,964.81	1,500.00	.....	66,464.81
		V. 740	250,000.00	.....	.....	316,464.81

Immediately to the left of these entries and on the same page appear the following entries which were also made in the year 1924 and subsequent to the examination of the books by a revenue agent:

17		Analysis		19	
Preferred stock.	Del. Co.	Agency a/c.		Private a/c.	
\$125,000 .00		\$125,000 .00	Rentals	\$66,464 .81	
		11,187 .49	Various		
		62,590 .41	A/cs.		
	\$25,000 .00	25,000 .00	\$29,321 .28		
		5,468 .75			
\$100,000 .00		\$199,925 .37	3,124 .90	\$66,464 .81	
		7,000 .00			
		12,534 .92		\$66,464 .81	
\$100,000 .00		\$216,335 .39			\$40,740 .00
		12,593 .02			
		6,270 .81			
	25,000 .00	25,000 .00			
\$75,000 .00	260,199 .22		908 .93	25,724 .81	
\$75,000 .00	\$259,290 .29			\$25,724 .81	

The income of L. J. Christopher for the year 1921 as computed by respondent was \$220,999.06.

In February 1921 Delaware Company was organized under the laws of Delaware and thereupon the following bill of sale was executed:

For a valuable consideration, receipt of which is hereby acknowledged, L. J. Christopher Company, a corporation, organized and existing under and by virtue of the laws of the State of California, hereinafter referred to as the vendor, of the one part, hereby grants, conveys, and assigns to L. J. Christopher Company, a corporation, organized and existing under and by virtue of the laws of the State of Delaware, hereinafter referred to as the vendee of the other part, all that certain personal property consisting of the stock of goods, wares, and merchandise, materials, manufactured articles, machinery, trucks equipment, and all personal property owned by the vendor herein and which is now in and about those certain premises heretofore operated by said vendor on Lots 1, 2, 3, 9, 10, and 11, 18 of Tract No. 2651, in Los Angeles City, and all property, including good will, owned by said vendor, save and except real estate (including buildings) and cash (including bills and accounts of every kind outstanding). It is understood and agreed between said parties that all of the said properties are free from encumbrances.

L. J. CHRISTOPHER CO.,
A California Corporation,
By L. J. CHRISTOPHER, *Pres.*
ALFRED BEAUDRY, *Secy.*

L. J. Christopher was at this time president of both corporations. The consideration paid by Delaware Company to California Company under the above bill of sale was \$125,000 cash and 1250 shares of its 7 per cent preferred stock of the par value of \$100 each. The cash was paid by the check of Delaware Company payable to California Company. This check was endorsed by California Company to L. J. Christopher who deposited it in bank to his personal account. During 1921, Delaware Company retired \$25,000 par value of its preferred stock for the sum of \$25,000. The check representing this payment was payable to and received by California Company and by it endorsed to L. J.

Christopher who deposited it in bank to his personal account. Prior to the sale to Delaware Company, California Company had placed orders for goods at a sale price of \$12,093.46 and had paid this sum to the sellers. The goods were received subsequent to the sale and turned over to Delaware Company who thereupon paid to California Company the price, \$12,093.46. California Company did not dissolve after the sale of part of its assets to Delaware Company and is now in existence, holding and controlling its remaining assets. The income of Delaware Company for the year 1921 as computed by respondent was \$124,073.53 and its invested capital for the same period as determined by respondent was \$279,745.85 computed as follows:

19 Capital stock \$275,000; plus additions \$14,626, issued on March 31, 1921, pro rated for 276 days, \$11,059.65. \$220 par of stock issued on September 30, 1921, pro rated for 93 days \$56.05. Total \$286,115.70. Reductions on account of 250 shares of preferred stock redeemed on September 30, 1921, pro rated for 93 days, \$6,369.85.

At the hearing respondent introduced in evidence the following two instruments in writing:

Income and Profits Tax Waiver for Taxable Years Ended Prior to Jan. 1, 1922.

In pursuance of the provisions of existing Internal Revenue Laws, L. J. Christopher Co. of Calif., a taxpayer of Los Angeles, Calif., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1920 and 1921 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall

be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

(Signed)

L. J. CHRISTOPHER CO.
OF CALIFORNIA,

Taxpayer,

By C. HOOKSTRATTEN,

D. H. BLAIR, C. A. D.,

Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

20 *Income and Profits Tax Waiver for Taxable Years
 Ended Prior to Jan. 1, 1922.*

IT:E:SM. JRM:D-25761-3.

In pursuance of the provisions of existing Internal Revenue Laws L. J. Christopher Company of Delaware, a taxpayer of Los Angeles, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the period February 16 to December 31, 1921 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said dates shall be extended by the num-

ber of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

L. J. CHRISTOPHER CO.,

Taxpayer.

C. HOOKSTRATTEN,

Secy. Treas.

21st & Los Angeles St., Los Angeles, Cal.

D. H. BLAIR, J. G.,

Commissioner.

Subscribed and sworn to before me this 13th day of Feb. 1926,

WILLIAM A. TAYLOR,

*Notary Public in and for the County of
Los Angeles, State of California.*

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

At the date of the execution of the waiver in behalf of California Company, St. Cuir Hookstratten, who signed said waiver in behalf of said company, was its secretary. St. Cuir Hookstratten, who signed the waiver in behalf of Delaware Company is now and since some time in 21 1921 has continuously been its secretary-treasurer.

The waiver filed in behalf of Delaware Company is stamped as received by respondent February 9, 1926. The waiver in behalf of California Company bears no stamp of any kind. The deficiency letter to California Company, which is the basis of its appeal was mailed by respondent April 6, 1926. The deficiency letter to Delaware Company, which is the basis of its appeal, was mailed by respondent on April 24, 1926.

Opinion.

MILLIKEN: Respondent has determined that L. J. Christopher received in the year 1921 from California Company

taxable dividends in the net amount of \$192,872.67, computed as follows:

2/15/1921. Balance due L. J. Christopher Co. (Calif. Corp.)	\$66,464.81
2/15/1921. Cash received from L. J. Christopher Co. of Delaware on sale of assets by the L. J. Christopher Co. of California to the L. J. Christopher Co. of Delaware	125,000.00
Cash received from L. J. Christopher Co. of Delaware in cancellation of 250 shares preferred stock, the property of L. J. Christopher Co. of California	25,000.00
Profit realized on sale of assets to Delaware Corp. by California Corp.	12,093.46
Accrued interest on Liberty Bonds sold Mr. Christopher during year	174.22
	\$228,732.49
Less:	
General expense	\$3.70
Unexpired taxes	2,022.06
" insurance	4,512.78
Federal taxes paid by Mr. Christopher	29,321.28
	35,859.82
	\$192,872.67

22 In the brief filed in his behalf in these proceedings, L. J. Christopher contends (1) that the above net amount, if a dividend, was a liquidating dividend and is not taxable since he has not recovered the cost of his stock; (2) that said net amount was not a dividend but was a liability to and an asset of the corporation, and (3) that if a dividend, the total net amount of \$192,872.67 should be reduced by the sum of \$34,344.53, the net amount received by him from the corporation prior to January 1, 1921.

With respect to the first contention, it is to be observed that California Company has not been dissolved, that it is

now in active operation controlling and managing the assets reserved in the sale to Delaware Company, and that so far as the record discloses, this petitioner has surrendered none of his stock for cancellation. Counsel for petitioner discusses this issue as though it is controlled by Section 2(c) of the Revenue Act of 1918, when in fact the deficiency should be determined under Section 201 of the Revenue Act of 1921. The pertinent parts of this Section read:

Sec. 201(a) That the term 'dividend' when used in this title (except in paragraph (10) of subdivision (a) of section 234 and paragraph (4) of subdivision (a) of section 245) means any distribution made by a corporation to its shareholders or members, whether in cash or in other property, out of its earnings or profits accumulated since February 28, 1913, except a distribution made by a personal service corporation out of earnings or profits accumulated since December 31, 1917, and prior to January 1, 1922.

* * * * *

(c) Any distribution (whether in cash or other property) made by a corporation to its shareholders or members otherwise than out of (1) earnings or profits accumulated since February 28, 1913, or (2) earnings or profits accumulated or increase in value of property accrued prior to March 1, 1913, shall be applied against and reduce
23 the basis provided in section 202 for the purpose of ascertaining the gain derived or the loss sustained from the sale or other disposition of the stock or shares by the distributee.

The first question is whether these withdrawals by this petitioner fall within the term "distribution" as used in Section 201. It is contended that this must be answered in the negative, since it appears that California Company made no formal declarations of dividends and also because the various withdrawals were entered on the books of California Company as charges against this petitioner.

We are dealing with a one man corporation, which so far as the record discloses, was conducted by L. J. Christopher as though it was an individual business. That

portion of his personal account with California Company which was introduced in evidence discloses that although his salary was in the amount of \$1,000 per month, he did not withdraw any part of it. On the other hand, he withdrew money and other items whenever, it appears, he needed them and these withdrawals were credited by his salary and other items including Victory Bonds. Another pertinent fact is that California Company from the date of its organization to and including the year 1921, made no formal declaration of a single dividend. Since during all this time this petitioner was the owner of practically all the capital stock of California Company and had absolute control, and since the only distribution of earnings made in these seven years were by reason of these withdrawals, we are clearly of the opinion that they were distributions made by California Company as that term is used in Section 201. See *Chattanooga Savings Bank v. Brewer* (C. C. A.) 17 Fed. (2d) 79; *Bockius Realty Company*, 1 B. T. A. 939; *Walle & Co., Ltd.*, 1 B. T. A. 1064; *A. C. McLock & Co.*, 11 B. T. A. 816, and *Moline Dispatch Publishing Co.*, 11 B. T. A., 934, promulgated May 24 2, 1928.

There is no merit in the contention that the withdrawals created a debt in favor of California Company. There is nothing in the record that to the slightest degree indicates that L. J. Christopher executed any notes or other evidences of indebtedness or that he paid any interest thereon or that interest was charged to his account. In a protest filed by him with respondent on July 7, 1925, he stated under oath: "That he has made no accounting to the California Company for the monies received through the sale of the assets to the Delaware Company; that no dividend has been declared by the California Company during 1921 or any subsequent years." Similar contentions as to the effect of such charges were made and rejected in *Chattanooga Savings Bank v. Brewer & Co., Ltd.*, and *Moline Dispatch Publishing Co.*, both *supra*. Since there is no evidence in the record which indicates that L. J. Christopher intended to repay these withdrawals, the mere entries made on the books of charges against him cannot convert into an asset what was in fact a distribution. In 1924, and after an examination of the books of

the corporation by a revenue agent, additional entries were made to indicate that the withdrawals were held by L. J. Christopher as the agent of California Company. It thus appears that on the date of the making of the new entries the theory of personal indebtedness was abandoned and the theory of agency was substituted. The making of these later entries we regard as an afterthought and as of no importance except to the extent that they indicate a new theory to avoid tax liability.

Petitioner's contention that the amount of the distribution as determined by respondent (\$192,872.67) should be reduced by the sum of \$34,344.53, which is the net
25 charge against L. J. Christopher as of December 31, 1920, is well taken. The petitioner further faintly contends that he should not be charged with the item of \$12,093.46. The burden rests upon petitioner to overcome the findings of respondent on this point. Although he testified at the hearing, he gave no testimony with respect to this item. It is asserted that since this item does not appear on the transcript of his account as it appears on the ledger of California Company, we should accept this negative evidence as sufficient to overthrow respondent's determination. To this we cannot agree. It may be pointed out, however, that the entries made in 1924 contain a charge against this petitioner as of 1921 of \$62,590.41 with the explanation "various a/cs". For all we know, this entry may contain the charge of \$12,093.46.

It is essential to the taxation of a distribution by a corporation as a dividend under Section 201 that it was paid "out of its earnings and profits accumulated since February 28, 1913." As California Company was organized in 1914, it only remains to discuss whether under the facts presented by the record petitioner has met the burden of proof imposed upon him. Respondent has made his determination to the effect that the distributions were paid out of earnings and profits and petitioner has introduced no evidence whatever to the effect that they were not so paid. The books of the corporation were available (in fact adjournment of the hearing was taken to enable counsel to investigate these very books) and no attempt was made to introduce them or extracts from them relative to earnings or profits. Respondent in statement attached to the

sixty day letter sent to California Company sets forth a surplus and undivided profit account which is in excess of the distributions as here determined. In the absence of evidence, respondent must be affirmed on this point.

26 Subject to the deduction of the amount of \$34,344.53 above referred to, respondent's action in the proceeding of L. J. Christopher is affirmed.

California Company pleads that the assessment of the deficiency determined against it is barred by the statute of limitations. Delaware Company makes a similar plea. These allegations were denied by respondent and respondent thereupon placed in evidence the "waivers" set forth in the findings of fact. It is not necessary for us to pass upon the validity of these waivers. See however, *Trustees for Ohio & Big Sandy Coal Co.*, 9 B. T. A. 617; *Keeler Brass Company*, 10 B. T. A. 3, and *Sugar Run Coal Mining Co.*, 11 B. T. A. 587. It is sufficient to point out that there is no evidence in the record as to when the income and profits tax returns of these petitioners were filed. The contention that everyone is presumed not to have violated the law is without merit when applied to these proceedings, since the Revenue Act of 1921 (Sections 241 and 227) provides that the Collector may grant a reasonable extension of time not exceeding six months for the filing of returns. This precise question was decided adversely to petitioner's contention in *Edward M. Lawrence*, 3 B. T. A. 40; Compare *Lawrence v. Ham*, 19 Fed. (2d) 643. Since it does not appear that the assessment of these deficiencies is barred by limitations, it follows that collection is not barred. See *Friend M. Aiken*, 10 B. T. A. 553, and *Sugar Run Coal Mining Company*, *Supra*.

The contentions of California Company that the transactions between it and Delaware Company did not constitute a sale but did constitute reorganization are not pressed by petitioner, are in direct conflict with the evidence, and need not be considered further. California Company further contends that respondent erred in excluding from

27 cost, good will acquired by it from L. J. Christopher and by including in the purchase price the sum of \$12,093.46, which it received from Delaware Company under the conditions set forth in the findings of fact.

We are convinced that the private business of L. J. Christopher had at the time of the organization of California Company a good will which possessed value and that this value was included in the assets for which the stock of the corporation was issued. The question for decision is what was its value. The books of L. J. Christopher are lost and we are compelled to resort to the memories of witnesses. L. J. Christopher testified that in 1914 he was worth approximately one million dollars, that three-fourths of this amount resulted from the business which he incorporated and that the earnings of the business previous to incorporation ran from thirty to forty thousand dollars a year. When pressed for dates and amounts, he became uncertain and contradictory. He could not state what were the net profits of his business for the years 1910, 1911, 1912 and 1913. On direct examination, he stated the value of his business in 1914 was "about \$400,000 or \$500,000". When asked on cross-examination what assets composed his net worth of one million dollars, he testified that his plant, real estate alone, was worth \$500,000 or \$600,000 and this in the fact of the fact that this same real estate was turned into the corporation at a value of \$251,023.16. No paid-in surplus is or has ever been claimed by reason of the value of this real estate. On the other hand, the manager of the business prior to the organization of California Company and thereafter of that corporation up to July, 1920, who had full charge of the business and was familiar with its activities and its books, was by no means certain what, if any, profits were made in 1913 and 1914. He stated that according to his memory no money was lost prior to 1914.

28 If large profits had been made in these years, he certainly would have recalled them, since he testified from the same memory that California Company lost about \$30,000 in 1915 and about the same amount in 1916. Neither are we impressed with the testimony of this witness to the effect that the value of the business of any small wholesale ice cream concern over actual investment was 25 cents for each gallon sold during the year and that the value of the good will of a large established business was worth at least 50 cents for every gallon sold during the year. These statements were made without qualification—it mattered not

whether the ice cream was sold at a loss or at a profit. On cross-examination, he stated that he knew of no sale comparable to the sale of California Company to Delaware Company. However, we are impressed by the facts that L. J. Christopher started his business with investment of about \$50,000 in 1887, that it grew in value until in 1914 it was worth approximately \$400,000; that he had a trade-name that was valuable, and that he had extended his trade to outside cities and towns. We also recognize the fact that since the books involving these transactions are lost, we must resort to the memories of the various witnesses. While book value is of little weight, we accept the entries on the books of the California Company as the value placed upon the good will by the parties at the time of the transfer and fix the value of the good will as of that date of \$17,028.82. In computing the profit on sale to Delaware Company, this amount should be added to cost.

It is the contention of this petitioner that since it paid \$12,093.46 for goods which were thereafter turned over to Delaware Company, and was reimbursed by that company in precisely the same amount, no gain was made on the transaction. This is not precisely the question presented.

29 The issues are what gain did California Company make on its sale to Delaware Company, and whether this amount was included in the cost of that sale by petitioner in its tax return or by respondent in his determination. It may be pointed out that while the bill of sale includes "all property" with certain well defined exceptions, and while these goods do not fall within these exceptions, yet the "goods, wares, merchandise, and materials" sold were those then "in and about" the premises on which the plant was located and that the goods involved were not then so situated. The paper is inartificially drawn and we are impressed by the construction placed upon it by the parties at the time. It is highly improbable that the vendee would have made an additional payment for goods it had already bought and paid for, even though the same person was president of both corporations. We are of the opinion that these goods were not included in the assets sold for the approximate price of \$250,000 and that no gain should be determined by reason thereof.

Delaware Company asserts, first, that respondent erred in excluding from its invested capital good will acquired by

it from California Company. While the bill of sale recites that the good will of California Company was a part of the assets sold to Delaware Company, there is no evidence in the record which in any way shows the value of such good will, if indeed it had any value. The fact that the good will of L. J. Christopher had value in 1914, is no evidence of the fact that California Company had good will of value in 1921, or if it had value, what that value then was in that year. The value of the good will acquired by Delaware Company could easily have been proven if such value indeed existed. The books of California Company we have pointed out were accessible. We know nothing relative to the earnings of California Company during these years, except that its manager testified that to the best of his recollection the company lost about \$30,000 in the year 30 1915 and about the same amount in 1916. Respondent has determined that the alleged good will of California Company had no value in 1921, and petitioner has introduced no evidence which indicates that his finding was erroneous.

Next, this petitioner contends that it is entitled to special assessment under Section 328 of the Revenue Act of 1921. There is no evidence in the record to the effect that it was impossible to determine petitioner's invested capital. In fact, respondent has determined it. Nor is there any evidence to the effect that a mixed aggregate of tangible and intangible property was paid in for stock and that the respective values of the several classes of property cannot be determined. There is no proof of any abnormal conditions affecting petitioner's capital or income. The only evidence is the amount of "income" and the amount of invested capital as determined by the respondent.

Section 327 (d) of the Revenue Act of 1921 contains the following:

"This subdivision shall not apply to any case (1) in which the tax (computed without the benefit of this section) is high merely because the corporation earned within the taxable year a higher rate of profit upon a normal invested capital, * * *"

Petitioner is not entitled to the benefit of Section 328 of the Revenue Act of 1921. See *Plainfield Grain Co.*, 9 B. T. A. 446.

Judgment will be entered under Rule 50.

Now, June 9, 1930, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

31 United States Board of Tax Appeals, Washington.

Docket No. 17442.

L. J. CHRISTOPHER COMPANY OF DELAWARE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Final Order of Redetermination.

This proceeding having been called from the day calendar of February 13, 1929, for order of redetermination under Rule 50, pursuant to the decision of the Board promulgated in this cause on October 2, 1928, and counsel for respective parties having submitted proposed alternative redetermination it is

Ordered and decided that upon redetermination there is a deficiency in tax with respect to this petitioner, for the year 1921, in the amount of \$20,210.94.

Enter.

Entered Feb. 15, 1929.

(Signed) JOHN B. MILLIKEN,
Member United States Board of Tax Appeals.

Now, June 9, 1930, the foregoing order of redetermination certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

A true copy. Teste:

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

32 United States Board of Tax Appeals. Filed Aug.
14, 1929.

United States Board of Tax Appeals.

Docket No. 17448.

L. J. CHRISTOPHER COMPANY OF DELAWARE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Stipulation for Court of Review.

It is hereby agreed and stipulated by and between counsel for the respective parties that review of the Board's decision and order in the above designated proceeding may be had before the Court of Appeals of the District of Columbia in accordance with the statutes made and provided, and regulations issued pursuant thereto.

GEO. E. H. GOODNER,

Counsel for Petitioner.

C. M. CHAREST,

F.,

General Counsel, Bureau of Internal Revenue,

Counsel for Respondent.

Now, June 9, 1930, the foregoing stipulation for court of review certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

33 United States Board of Tax Appeals. Filed Aug. 14, 1929.

In the Court of Appeals of the District of Columbia,
— Term, —.

No. —.

L. J. CHRISTOPHER COMPANY OF DELAWARE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

(Board of Tax Appeals Docket No. 17448.)

*Petition for Review of Decision of United States Board of
Tax Appeals.*

To the Honorable the Chief Justice and the Associate Justices of the Court of Appeals of the District of Columbia:

Your petitioner respectfully represents to the Court:

I. Jurisdiction.

1. That L. J. Christopher Company of Delaware, the above-designated petitioner, is a corporation duly organized and existing under the laws of the State of Delaware, with its principal office at 2101 South Los Angeles Street, Los Angeles, California.

2. That respondent is the duly appointed and acting Commissioner of Internal Revenue of the United States.

3. That heretofore petitioner, pursuant to law, appealed to the United States Board of Tax Appeals from the respondent's determination of a deficiency for the period February 16th to December 31st, 1921, and that the proceeding before the Board was docketed at No. 17448.

4. That petitioner desires a review of the decision of the Board in said proceeding and brings this action under the provisions of Sections 1001, 1002, and 1003 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928.

II. Nature of the Controversy.

1. That petitioner was organized on February 15, 1921, to take over a wholesale and retail ice cream, candy and confectionery business theretofore conducted by the L. J. Christopher Company of California.

2. That said California Company then had valuable intangible assets consisting of good will, trade marks, trade brands, etc., which had enabled it to earn large profits.

3. That on the aforesaid date petitioner acquired from said California Company a mixed aggregate of tangible and intangible property for which it paid \$125,000.00 in cash and 1,250 shares of its stock.

4. That said good will, trade marks, and trade brands had a value of not less than \$100,000.00 at the time paid into petitioner corporation.

5. That on the last above-mentioned date, said California Company leased to petitioner for a term of twenty-five years the grounds and buildings in which its operations had been conducted, and thereupon discontinued its ice cream, candy and confectionery business.

6. That the profits earned by petitioner during 1921 were in a large measure attributable to said intangible assets and to the activities of said California Company in previous years.

7. That petitioner, on or before the date prescribed by law, filed a corporation income and profits tax return for the period February 16, 1921, to December 31, 1921, on which a tax of \$24,099.59 was assessed and paid.

8. That in auditing said return respondent determined the net income to be \$124,073.53, the invested capital computed under Section 326 of the Revenue Act of 1921 to be \$279,745.85, and the total tax assessable to be \$44,310.53.

9. That in computing the invested capital, respondent included therein no amount for good will, trade marks, trade brands, etc., acquired as aforesaid, and also denied petitioner's request for assessment under Section 328 of the Revenue Act of 1921.

10. That pursuant to said audit respondent notified petitioner of a deficiency in tax in the amount of \$20,210.94 which said notice was mailed to petitioner by registered letter dated April 24, 1926.

11. That petitioner in due time appealed to the
35 United States Board of Tax Appeals from said deficiency notice, which appeal was heard by the Board on April 17th and 18th, 1928.

12. That at said hearing counsel for respondent offered in evidence an instrument which he alleged to be a consent in writing extending the period for assessment until December 31, 1926, or what is commonly called a "waiver".

13. That thereupon counsel for petitioner objected to the introduction in evidence of said instrument, on the grounds that it was signed only by the secretary of the corporation and not by the president; that the duties of the secretary did not authorize him to sign contracts without authority of the Board of Directors, and for the further reason that the instrument did not purport to be signed by the Commissioner of Internal Revenue, but by some other person, whose initials so far as could be determined were "L. G."

14. That thereupon the Board overruled the objection and admitted said instrument in evidence, which was marked "Respondent's Exhibit D," and which is set forth *in extenso* in the Board's Findings of Fact.

15. That thereafter on October 2, 1928, the Board promulgated its findings of fact, wherein it approved respondent's determination of the deficiency.

16. That in conformity with the aforesaid findings and decision, the Board entered its final order of redetermination on February 15, 1929, wherein it ordered and decided that there is a deficiency in tax for the year 1921 in the amount of \$20,210.94.

III. Designation of Court of Review.

That petitioner is aggrieved by said decision and order of redetermination of the Board in said proceeding (B. T. A. Docket No. 17448) and now seeks a review thereof in the Court of Appeals of the District of Columbia, in accordance with a stipulation between the parties filed with the Board pursuant to the provisions of Section 1002 (d) of the Revenue Act of 1926.

IV. Assignments of Error.

That petitioner as a basis for the review makes the following assignments of error:

1. The Board of Tax Appeals erred in admitting the waiver in evidence.

2. The Board of Tax Appeals erred in holding that there was no evidence as to when the return of petitioner was filed.

36 3. The Board of Tax Appeals erred in holding that the proposed deficiency was not barred by the statute of limitations.

4. The Board of Tax Appeals erred in holding that the petitioner was not entitled to the benefits of the provisions of Section 328 of the Revenue Act of 1921.

Wherefore, petitioner prays that this Honorable Court will review the said findings, decision, opinion and order of redetermination of the Board of Tax Appeals, and reverse and set aside the same insofar as the aforesaid assigned errors apply and therein find for petitioner, and grant such other and further relief as petitioner may be entitled to or which to the Court may seem equitable and proper.

GEO. E. H. GOODNER,
GEO. E. H. GOODNER,
Attorney for Petitioners.

Address: Munsey Building, Washington, D. C.

PAUL D. BANNING,
Of Counsel.

DISTRICT OF COLUMBIA, ss:

Personally appeared before me, a Notary Public in and for the District of Columbia, Mr. Geo. E. H. Goodner, who being duly sworn according to law deposes and says that he is the Attorney for the above named petitioner, and that as such he has authority to sign and did sign the foregoing petition; that he has read the same and that the facts set forth therein are true to the best of his knowledge and belief, and that the said petition is signed in good faith.

GEO. E. H. GOODNER.

Subscribed and sworn to before me this 10th day of August, 1929.

[Seal of Florence M. Stephenson, Notary Public, District of Columbia.]

FLORENCE M. STEPHENSON,
Notary Public.

My commission expires April 28, 1931.

37 United States Board of Tax Appeals. Filed Aug.
14, 1929.

In the Court of Appeals of the District of Columbia,
— Term, —.

No. —.

L. J. CHRISTOPHER COMPANY OF DELAWARE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

(Board of Tax Appeals Docket No. 17448.)

Notice of Filing of Petition for Review.

To C. M. Charest,
General Counsel, Bureau of Internal Revenue,
Washington, D. C.,
Attorney for Respondent:

Please take notice that on the 14th day of August, 1929, the undersigned will present to the United States Board of Tax Appeals and file with the Clerk thereof a petition for review by the Court of Appeals for the District of Columbia of the final order and decision of the Board rendered and entered on its records on February 15, 1929, in the appeal of the above named petitioner to said Board, Docket No. 17448, a copy of which petition for review is attached hereto.

Dated at Washington, D. C., this 10th day of August, 1929.

GEO. E. H. GOODNER,
Attorney for Petitioner.

Address: Munsey Building, Washington, D. C.

Service of the above notice, accompanied by a copy of the said petition, is hereby accepted this 14th day of August, 1929.

C. M. CHAREST,
F.,

*General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.*

Now, June 9, 1930, the foregoing petition for review, notice of filing and proof of service certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

38 United States Board of Tax Appeals. Filed — —, 1930.

In the Court of Appeals of the District of Columbia,

— Term, —.

No. —.

L. J. CHRISTOPHER COMPANY OF DELAWARE, Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

(Board of Tax Appeals Docket No. 17448.)

Statement of Evidence.

In addition to the facts found by the Board of Tax Appeals and set out in its Findings of Fact, the following evidence offered at the hearing in this cause is deemed material to the due presentation and consideration of the assignments of error.

Upon the conclusion of testimony on behalf of the petitioner, the following proceedings were had:

“Mr. Blaisdell (Attorney for respondent): With reference to the amendments to the petitions which were allowed

yesterday at the beginning of this trial, I would ask to have the record show that the Commissioner denies each and every one of those amendments.

The Member: That will be done. Does the Respondent desire to introduce any evidence?

Mr. Blaisdell: Yes, sir; and also to include the affirmative allegation in both the Christopher Company of California and the Christopher Company of Delaware, that the petitioner in each of these cases has duly filed a waiver for the year 1921.

Mr. Goodner: Now, your Honor, we object to such testimony as that going into the record. It seems to me the pleadings show the date on which the deficiency letter was issued, and there is no reference in the deficiency letters to the fact that there are any waivers on file in the Commissioner's office, and it would certainly be incumbent upon the Commissioner to produce evidence that he had the right to make the assessment at the time.

The Member: Well, I think this question of whether there were or were not waivers does not necessarily need to be raised by an affirmative allegation; it is merely a matter of proof, and as I take it the Commissioner at this time
39 is not required to put on any proof relative to the statute of limitations, because I know nothing about.

That question goes clearly out of the case in the present situation now, and the Respondent is sustained upon the ground that he made the assessment timely.

Mr. Goodner: I would like to note an exception.

The Member: Because there has been no evidence to that effect. I do not even know when the returns were filed. I know nothing about that part of the case.

Mr. Blaisdell: Notwithstanding your Honor's ruling, I would like to introduce these waivers.

The Member: I see no objection to it, if you want to introduce them. Can you tell me, Mr. Goodner, from the evidence thus far introduced in the case, when the returns were filed for the Petitioners?

Mr. Goodner: I do not recall that I can, your Honor, right now.

The Member: Very well. That is a very necessary fact, in order to know whether the statute has run, or not, is it not?

Mr. Goodner: I do not know whether you expect me to give an answer on that proposition off-hand, that would bind me, or not.

The Member: Well, I do not know when the returns were filed.

Mr. Goodner: I am not so sure but what the record may furnish sufficient evidence that the returns were filed timely and——

The Member: What is the evidence? Just tell me what it is. That is what I want to know, what it is.

Mr. Goodner: I am inclined to think there are some things that must be presumed.

The Member: Where am I going to obtain the presumption?

Mr. Goodner: I am surely not going to be able to tell you at this time, your Honor.

The Member: All right, sir. That is the reason why I suggested to counsel for the Respondent that it was unnecessary, but I want him to try his case as he sees fit. Let us proceed. What is the next situation?"

40 During the examination of *Mr. St. Cuir Hookstratten*, a witness on behalf of *Respondent*, the following colloquy took place:

"By Mr. Blaisdell (attorney for respondent):

Q. Mr. Hookstratten, I hand you what purports to be a waiver on behalf of the L. J. Christopher Company of Delaware, covering the period of February 16th to December 31, 1921, purporting to be signed 'L. J. Christopher Company, by S. C. Hookstratten, Secretary-Treasurer', and subscribed and sworn to before Wm. A. Taylor, Notary Public, under date of February 13, 1926; and I will ask you if that is your signature? A. It is.

Q. As such officer? A. Yes, sir.

Mr. Blaisdell: The Respondent offers such waiver in evidence.

By Mr. Goodner (attorney for petitioner):

Q. Mr. Hookstratten, what are your duties as secretary of the L. J. Christopher Company? A. To take care of the records and books and do the things that the Board of

Directors and the Executive Committee authorizes me to do in that capacity.

Q. Did the Board of Directors authorize you to sign this waiver?

Mr. Blaisdell: That is objected to as not proper cross examination.

The Member: I think you questioned him as to whether, or not, he signed it in such capacity and he testified that he did. It seems to me it is proper to know whether, or not, he signed it within the scope of his duties. The objection will be overruled.

Mr. Blaisdell: Note an exception.

The Member: An exception noted. Answer the question.

The Witness: They did not."

* * * * *

41 "Mr. Goodner: The Petitioner now objects to the introduction of this waiver in evidence, for the reason, first, that it is signed only by the secretary of the corporation and not by the president. There is a specific notice on the bottom of this waiver, being the printed form used by the Treasury Department, which states that, if the waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the state in which the corporation is located to sign for the corporation. The witness has shown that he was not specifically authorized, and his duties as secretary do not authorize him to sign contracts without the authority of the Board of Directors; and for the further reason that this waiver is not signed by the Commissioner, but apparently is signed by somebody else, whose initials, as far as I can make out below the signature, are 'L. G.'

The Member: The objection is overruled. The waiver will be received in evidence. An exception noted. Proceed."

Said waiver so offered and received in evidence as respondent's Exhibit D was made a part of the record and is as follows:

(Here follows income and profits tax waiver, side folio 42.)

X *X* *Madison 3*

INCOME AND PROFITS TAX WAIVER

FOR TAXABLE YEARS ENDED PRIOR TO JANUARY 1, 1922

IT:E:SM
JRM:D-25761 - 3

15
APR 18 1928
8731
16085
17448
J

192

In pursuance of the provisions of existing Internal Revenue Laws L. J. Christopher Company of Delaware, a taxpayer of Los Angeles, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year ~~(or years)~~ period February 16 to December 31, 1921 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

Feb 1926
A. G. Dybb
By _____
J. N. Blair
Commissioner

J. H. H. H. H.
Taxpayer

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

FEB 19 1926 *Q*

BEST COPY AVAILABLE

from the original bound volume

Number 2

INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE

L. J. CHRISTOPHER COMPANY

1250 SHARES PREFERRED - PAR VALUE \$100
8750 SHARES COMMON - WITHOUT NOMINAL OR PAR VALUE

THIS IS TO CERTIFY THAT

Two hundred fifty fully paid shares of the par value of One Hundred Dollars each of the Preferred Capital Stock of
L. J. Christopher Co., a California Corporation
L. J. CHRISTOPHER COMPANY

transferable only in person or by attorney on the books of the company upon the surrender of this certificate duly endorsed.

The following is a statement of the nature and extent of the preference granted to the Preferred Stock:

The holders of the preferred stock shall be entitled to receive out of the surplus or net profits of the business of the corporation in each year dividends at the rate per annum (and no more) payable quarterly after issuance, on such dates as may be determined by the Board of Directors. Such dividends on the preferred stock shall be paid or set apart on the common stock and shall be cumulative, so that if dividends for any past dividend period at the rate of seven per centum (7%) per annum shall or set apart therefor, the deficiency shall be fully paid or set apart without interest. The said preferred stock shall be retired at par in the amount of Twenty-Five Thousand end of February of each year after the organization of this corporation by payment to the holders of such stock the said par value, together with the dividends thereon which may have been accumulated.

Retirement of the preferred stock shall be effected by the payment out of a surplus fund of the company, which shall be created by the Board of Directors, who shall, at that purpose in each year after the issuance of any preferred stock in such month as may be determined by the Board of Directors, not less than thirty (30) days prior to the maturing block of preferred stock, and after declaring an annual dividend of seven per centum (7%) upon the preferred stock and also dividends, if any, accumulated thereon, if no such dividend shall exist, set aside at least the sum of Twenty-Five Thousand Dollars (\$25,000.00) of the then remaining net earnings of the company as a fund out of which such retirement of the stock and it shall be the duty of the directors and they shall have the power hereunder to use such fund in retiring such per centum of the preferred stock issued and outstanding as a

The particular shares of preferred stock to be retired may be determined by block, lot or in such other equitable manner as may be determined by the Board of Directors. The foregoing provisions of this subdivision require the redemption from any stockholder of a fraction of a share, the Board of Directors shall have power in its discretion to purchase such stock has been declared retired, in whole or in part, and that an amount of cash equal to the par value thereof, plus dividends accumulated and accrued, is in the company's treasury, such stock so declared retired shall bear no further dividends, unless the company shall fail to redeem such stock in accordance with the terms thereof.

At all times and so long as any of the preferred stock is outstanding the corporation shall maintain net current assets in excess of one hundred and twenty-five per centum assets in excess of two hundred per centum (200%) of the aggregate par value of the outstanding preferred stock; current assets being herein defined to be cash on hand, accounts receivable, manufactured stock, goods, wares, and merchandise in process of manufacture and in warehouse, and tangible assets being herein defined to be all of the assets of the corporation.

So long as preferred stock of the aggregate par value of Twenty-Five Thousand Dollars (\$25,000.00) or more, is outstanding and not retired, or no provision made for the retirement of the same, the owners or holders of a majority of said preferred stock so outstanding shall be entitled to designate a member of the Board of Directors of said corporation and the person so designated shall become a member of said board; and, so long as any of said preferred stock is outstanding and not retired or no provision made for the retirement thereof, full assets and liabilities of the corporation shall be rendered monthly, at such times as may be determined by the Board of Directors, to the holders of the preferred stock.

So long as any of the preferred stock shall be outstanding the corporation shall not mortgage or pledge any of its properties without the consent of the holders of not less than seventy-five (75%) of the preferred stock then outstanding, except that said corporation may create liens or permit title to be retained by the vendor to secure purchase money due for or to be paid for the same.

The consent of the holders of the preferred stock necessary to authorize the corporation to mortgage its properties as hereinbefore specified may be procured by the holders of said stock and filed with the company or by consent given at a special meeting called in the manner specified for special stockholders' meetings as provided in the charter of said stock and hereby declared to be those persons holding the same as appears upon the books of the corporation at the time the Board of Directors of said corporation shall desire to mortgage or pledge its properties and provide for the procuring of the consent of said preferred stockholders; provided that notice of said resolution, accompanied by a copy of the same, shall be delivered or mailed to the last known address of each holder of said preferred stock, whose name then appears upon the books of the corporation as within ten (10) days after the passage of said resolution, and provided the consent of the holders of the requisite amount of said shares of preferred stock shall be procured within the passage of said resolution, but a failure to procure the consent of the holders of the requisite number of shares of preferred stock at any time shall not preclude it from being procured at a later date, upon a compliance with the terms of this Certificate of Incorporation.

The corporation will at no time while any of said preferred stock is outstanding and unredeemed or no provision made for the redemption thereof, create any stock or debt in excess of the amount of the assets of the corporation; nor shall the corporation during said period of time create or issue any other or further preferred stock, with it with respect to the payments of dividends or in the distribution of assets; nor shall the corporation thereto or the holders of at least three-fourths (¾) of the par value of the hundred fifty (1250) shares herein provided for, unless it shall first have obtained the written consent thereto of the holders of at least three-fourths (¾) of the par value of the stock, which said written consent shall be obtained in the manner herein set forth for the obtaining of written consent to the mortgaging or pledging of corporate property.

In the event of any attachment or execution being levied against any of the property of the corporation, the same shall be with the holders of the preferred stock, which said written consent shall be obtained in the manner herein set forth for the obtaining of written consent to the mortgaging or pledging of corporate property.

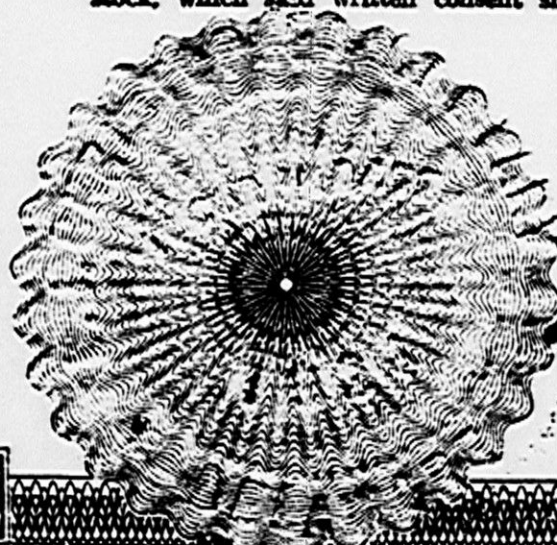
In the event of the liquidation or dissolution or winding up of the corporation, whether voluntary or involuntary, the holders of the preferred stock shall be entitled to be paid in full the par value of their shares and the unpaid dividends accrued thereon before any amount shall be payable to the holders of the common stock and after the payment to the holders of the preferred stock of its par value and the unpaid dividends accrued thereon, the remaining assets of the corporation shall be divided and paid to the holders of the common stock.

Whenever dividends at the rate of seven per centum (7%) per annum upon the preferred stock for all past dividend periods at the rate of seven per centum (7%) per annum shall have been paid by the corporation and whenever funds for the retirement of the preferred stock shall be set aside from the assets of the company as hereinabove provided, the Board of Directors may declare dividends on the common stock, payable at such time as the remaining surplus or net profits.

The common stock without nominal or par value shall have and possess the full and exclusive voting power and the preferred stock shall have no vote upon the election of directors or officers or upon any other questions affecting the management of the affairs of the corporation.

IN WITNESS WHEREOF, L. J. Christopher Company has caused its corporate seal to be hereunto affixed and this certificate

authorized officers this 15th day of February, 1912
L. J. Christopher Secretary.



CORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE

1250 Shares

CHRISTOPHER COMPANY

1250 SHARES PREFERRED - PAR VALUE \$100
SHARES COMMON - WITHOUT NOMINAL OR PAR VALUE

Christopher Co., a California Corporation

is the owner of

fully paid shares of the par value of One Hundred Dollars each of the Preferred Capital Stock of

L. J. CHRISTOPHER COMPANY

company upon the surrender of this certificate duly endorsed.

of the preference granted to the Preferred Stock:

receive out of the surplus or net profits of the business of the corporation in each year dividends at the rate of seven per centum (7%) such dates as may be determined by the Board of Directors. Such dividends on the preferred stock shall be payable before any dividends cumulative, so that if dividends for any past dividend period at the rate of seven per centum (7%) per annum shall not have been paid thereon are but without interest. The said preferred stock shall be retired at par in the amount of Twenty-Five Thousand Dollars (\$25,000.00) at the retirement by payment to the holders of such stock the said par value, together with the dividends thereon which may have accumulated or accrued. The payment out of a surplus fund of the company, which shall be created by the Board of Directors, who shall, at a meeting to be held for the stock in such month as may be determined by the Board of Directors, not less than thirty (30) days prior to the retirement date of the next dividend of seven per centum (7%) upon the preferred stock and also dividends, if any, accumulated thereon, if net earnings for that purpose shall (\$25,000.00) of the then remaining net earnings of the company as a fund out of which such retirement of the preferred stock shall be made. Power hereunder to use such fund in retiring such per centum of the preferred stock issued and outstanding as such fund will provide for. To be determined by block, lot or in such other equitable manner as may be determined by the Board of Directors. In any case where the sum any stockholder of a fraction of a share, the Board of Directors shall have power in its discretion to purchase and retire the full share. The holders of preferred stock so selected or chosen to be redeemed and retired. After a stockholder shall have been notified that his preferred amount of cash equal to the par value thereof, plus dividends accumulated and accrued, is in the company's treasury subject to his order, unless the company shall fail to redeem such stock in accordance with the terms thereof.

is outstanding the corporation shall maintain net current assets in excess of one hundred and twenty-five per centum (125%) and net tangible assets of the value of the outstanding preferred stock; current assets being herein defined to be cash on hand, accounts and notes receivable, of manufacture and in warehouse, and tangible assets being herein defined to be all of the assets of the corporation save and except good will. Twenty-Five Thousand Dollars (\$25,000.00) or more, is outstanding and not retired, or no provision made for the retirement thereof, the corporation shall be entitled to designate a member of the Board of Directors of said corporation and the person so designated shall be elected and retired stock is outstanding and not retired or no provision made for the retirement thereof, full time and correct statements showing the corporation shall not mortgage or pledge any of its properties without the consent of the holders of not less than seventy-five per centum of the corporation may create liens or permit title to be retained by the vendor to secure purchase money due for the properties purchased, which

any to authorize the corporation to pledge or mortgage its properties as hereinbefore specified may be procured in writing to be signed by not given at a special meeting called in the manner specified for special stockholders' meetings as provided in the by-laws, and the holders same as appears upon the books of the corporation at the time the Board of Directors of said corporation shall by resolution declare the procuring of the consent of said preferred stockholders; provided that notice of said resolution, accompanied by a written or printed consent address of each holder of said preferred stock, whose name then appears upon the books of the corporation as the lawful holders thereof, provided the consent of the holders of the requisite amount of said shares of preferred stock shall be procured within thirty (30) days after that of the holders of the requisite number of shares of preferred stock at any time shall not preclude it from the effort to procure subsequent of Incorporation.

preferred stock is outstanding and unredeemed or no provision made for the redemption thereof, create any stock ranking prior to or on a parity distribution of assets; nor shall the corporation during said period of time create or issue any other or further preferred stock than the twelve per cent have obtained the written consent thereto of the holders of at least three-fourths (¾) of the par value of the outstanding preferred stock herein set forth for the obtaining of written consent to the mortgaging or pledging of corporate property.

any attachment or execution being levied against any of the property of the corporation, the same shall be within ten (10) days thereafter event any of the provisions herein contained for the safe-guarding of the preferred stock be violated, the holders or owners of the preferred to an immediate appointment of a receiver.

the liquidation or dissolution or winding up of the corporation, whether voluntary or involuntary, the holders of the preferred stock shall be full the par value of their shares and the unpaid dividends accrued thereon before any amount shall be payable to the holders of the common stock to the holders of the preferred stock of its par value and the unpaid dividends accrued thereon, the remaining assets and funds, if any, paid to the holders of the common stock.

dividends at the rate of seven per centum (7%) per annum upon the preferred stock for all past dividend periods shall have been declared and paid by the corporation and whenever funds for the retirement of the preferred stock shall be set aside from the remaining net earnings of the corporation provided, the Board of Directors may declare dividends on the common stock, payable at such time as the board may fix, out of any net profits.

stock without nominal or par value shall have and possess the full and exclusive voting power and the preferred stock shall not be entitled to of directors or officers or upon any other questions affecting the management of the affairs of the corporation.

WHEREOF, L. J. Christopher Company has caused its corporate seal to be hereunto affixed and this certificate to be signed by its duly

15th

day of

Secretary.

Vice-President.

NOTICE: THE SIGNATURE OF THIS ASSIGNMENT MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE
FACE OF THIS CERTIFICATE IN EVERY PARTICULAR WITHOUT ALTERATION OR ENLARGEMENT OR ANY CHANGE WHATSOEVER.

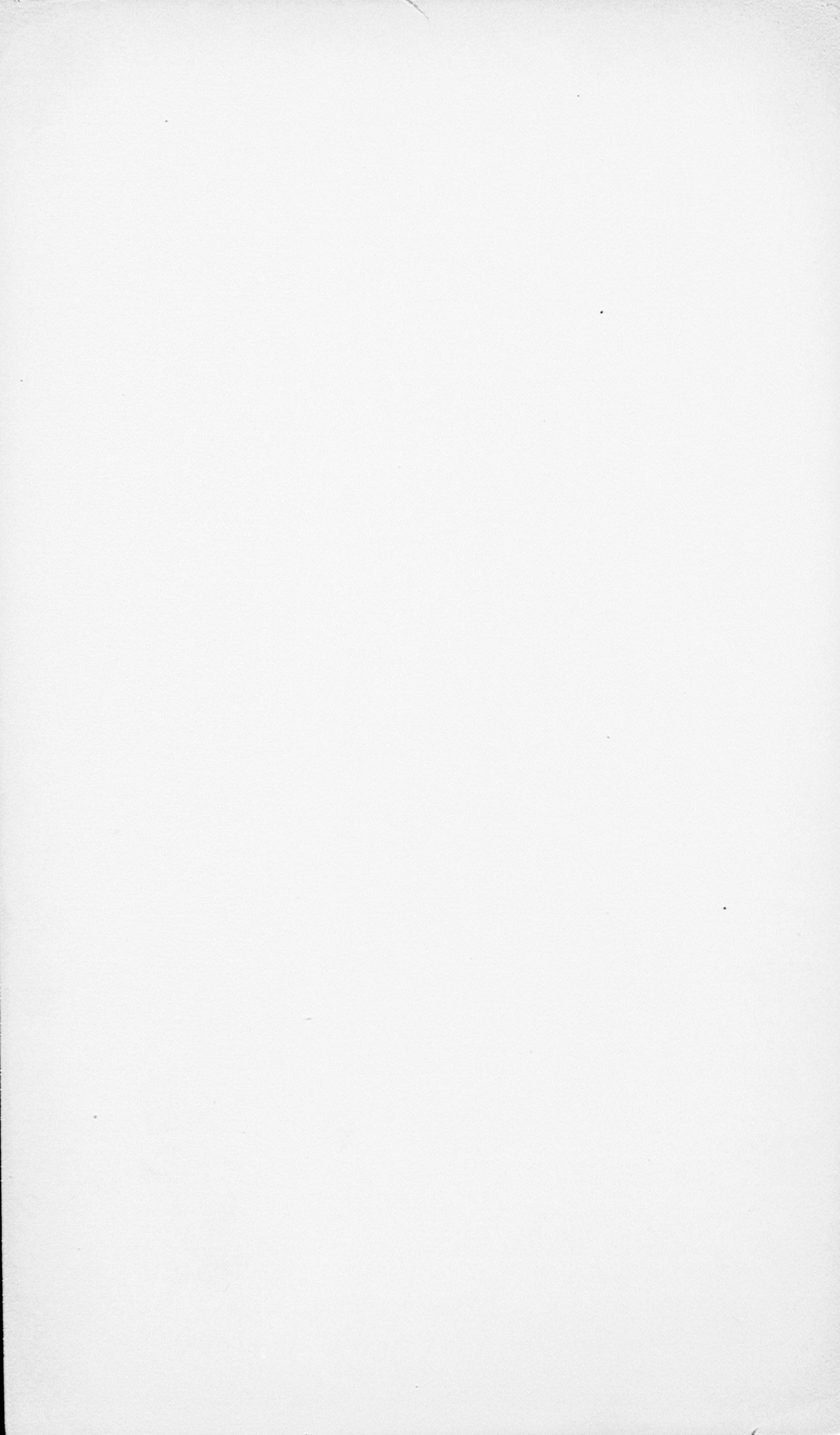
For value Received _____ hereby, sell, assign, and transfer unto

_____ Shares
of the Capital Stock represented by the within Certificate
and do hereby irrevocably constitute and appoint

_____ Attorney
to transfer the said stock on the Books of the within named
Corporation, with full power of substitution in the premises.
Dated _____ 19____

In presence of _____

8931
DIV. 15 DOCKET 16085
APR 17 1928
PETITIONER'S
EXHIBIT One



43 Petitioner's Exhibit 1, offered and received in evidence, being a certificate issued by L. J. Christopher Company of Delaware, the petitioner, for 1,250 shares of preferred stock, is as follows:

(Here follows certificate, side folio 44.)

45 The foregoing is a true and correct statement of all the evidence in this case, which, in addition to the facts set out in the Board's Findings of Fact, is material to the due consideration of the errors assigned.

GEO. E. H. GOODNER,
Attorney for Petitioner.

Address: Munsey Building, Washington, D. C.

Respondent has no objection to the foregoing statement of evidence.

C. M. CHAREST,
F.,
*General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.*

The foregoing is a corrected statement of the evidence as settled by the Board this 14th day of May, 1930.

LOGAN MORRIS,
Member U. S. Board of Tax Appeals.

Now, June 9, 1930, the foregoing statement of evidence certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

46 United States Board of Tax Appeals. Filed May
16, 1930.

In the Court of Appeals of the District of Columbia.

B. T. A. Docket No. 17448.

L. J. CHRISTOPHER COMPANY OF DELAWARE, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Designation of Record.

To the Clerk of the United States Board of Tax Appeals:

Will you please include in the transcript of record for the Court of Appeals of the District of Columbia the following:

1. The docket entries of proceedings before the Board.
2. The pleadings before the Board (petition and answer).
3. That part of the Reporter's Minutes of the hearing before the Board on April 17-18, 1928, beginning with line 9 on page 12 thereof, and continuing to and including line 5 on page 13; then omitting the balance of page 13 and indicate same by * * *; then including the first seven lines on page 14.
5. The motion of respondent granted by the Board March 16, 1928.
4. That part of the Reporter's Minutes of the hearing before the Board on April 17-18, 1928, beginning with line 5 on page 18 thereof, and continuing to and including line 19 on said page.
6. The findings of fact and opinion of the Board promulgated October 2, 1928.
7. The final order of redetermination of the Board entered February 15, 1929.
8. The stipulation as to the Court of Review.
9. The petition for review.
10. The statement of evidence as approved by the Board.
11. Orders enlarging time to prepare and transmit record to Clerk of Court, entered October 12, 1929; November

30, 1929; January 14, 1930; February 11, 1930; and
47 April 30, 1930.

Respectfully,

GEO. E. H. GOODNER,
GEO. E. H. GOODNER,
*Munsey Building, Washington, D. C.,
Attorney for Petitioner.*

Service of copy of the above Designation of Record on
me acknowledged this 16th day of May, 1930.

C. M. CHAREST,
F.,
*General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.*

Now, June 9, 1930, the foregoing designation of record
certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

48 United States Board of Tax Appeals.

Docket No. 17448.

L. J. CHRISTOPHER COMPANY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of counsel for the petitioner, it is

Ordered that the time for preparation of evidence and
transmission and delivery of record papers *sur* petition
for review of the above entitled proceeding in the Court of
Appeals of the District of Columbia be and it is hereby
extended to December 2, 1929.

(Signed) BENJAMIN H. LITTLETON,
Member.

Dated, Washington, D. C., October 12, 1929.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk.

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 17448.

L. J. CHRISTOPHER COMPANY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of counsel for the petitioner, it is

Ordered that the time for preparation of evidence and transmission and delivery of record papers *sur* petition for review of the above entitled proceeding in the Court of Appeals of the District of Columbia be and it is hereby extended to January 15, 1920.

(Signed)

LOGAN MORRIS,
Member.

Dated, Washington, D. C., November 30, 1929.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk.

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

50 United States Board of Tax Appeals.

Docket No. 17448.

L. J. CHRISTOPHER COMPANY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of counsel for the petitioner, it is

Ordered that the time for preparation of evidence and transmission and delivery of record papers *sur* petition for review of the above entitled proceeding in the Court of Appeals of the District of Columbia be and it is hereby extended to February 15, 1930.

(Signed)

LOGAN MORRIS,

Member.

Dated, Washington, D. C., January 14, 1930.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk.

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

51 United States Board of Tax Appeals.

Docket No. 17448.

L. J. CHRISTOPHER COMPANY OF DELAWARE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of counsel for the petitioner, it is

Ordered that the time for preparation of evidence and transmission and delivery of record papers *sur* petition for review of the above entitled proceeding in the Court

of Appeals of the District of Columbia be and it is hereby extended to May 1, 1930.

(Signed)

LOGAN MORRIS,
Member.

Dated, Washington, D. C., February 11, 1930.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk.

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 17448.

L. J. CHRISTOPHER COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of counsel of the petitioner it is

Ordered that the time for preparation of the evidence and transmission and delivery of the record *sur* petition for review of the above entitled proceeding in the Court of Appeals for the District of Columbia be and it is hereby extended to June 2, 1930.

(Signed)

LOGAN MORRIS,
Member.

Dated: Washington, D. C., April 30, 1930.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk.

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

53

United States Board of Tax Appeals.

Docket No. 17448.

L. J. CHRISTOPHER COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

For cause appearing of record, it is

Ordered that the time for transmission and delivery of the record sur petition for review of the above entitled proceeding in the Court of Appeals for the District of Columbia, be and it is hereby extended to July 1, 1930.

(Signed)

LOGAN MORRIS,

Member.

Dated: Washington, D. C., May 29, 1930.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk.

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

Endorsed on cover: Board of Tax Appeals. No. 5236. L. J. Christopher Company of Delaware, Appellant, vs. Commissioner of Internal Revenue. Court of Appeals, District of Columbia. Filed Jun. 14, 1930. Henry W. Hodges, Clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED

NOV 12 1930

Henry M. Rodgers
CLERK.

IN THE
Court of Appeals of the District of Columbia.

APRIL TERM, 1930

No. 5236.

L. J. CHRISTOPHER COMPANY OF DELAWARE, *Appellant*,
v.
COMMISSIONER OF INTERNAL REVENUE, *Appellee*.

*On Petition for Review of Decision of the United States
Board of Tax Appeals*

APPELLANT'S BRIEF.

GEO. E. H. GOODNER,
Munsey Building,
Washington, D. C.
Attorney for Appellant.

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IN THE
Court of Appeals of the District of Columbia.

APRIL TERM, 1930.

No. 5236.

L. J. CHRISTOPHER COMPANY OF DELAWARE, *Appellant*,
v.
COMMISSIONER OF INTERNAL REVENUE, *Appellee*.

*On Petition for Review of Decision of the United States
Board of Tax Appeals.*

Appellant's Brief.

I. STATEMENT OF THE CASE.

This case is before the Court on petition for review of the decision of the United States Board of Tax Appeals.

Appellant appealed to the Board from a letter of the Commissioner of Internal Revenue dated April 24, 1926, wherein he asserted a deficiency in income tax of \$20,210.94, for the period February 16 to December 31, 1921 (R. 4-8). The appeal alleged that the Commissioner erred in holding (a) that its invested capital could be determined and (b) that there were no abnormal conditions in income and invested capital which would entitle appellant to the provisions of

Section 328 of the Revenue Act of 1921 (R. 5). At the trial before the Board the petition was amended so as to allege (c) that good will acquired by appellant at the time of organization had been erroneously excluded from invested capital (R. 10) and (d) that the statute of limitations barred assessment at the time the 60-day deficiency letter was mailed (R. 11).

The case was consolidated for trial on April 17, 1928, before the Board, with two other cases—the appeals of *L. J. Christopher* and of *L. J. Christopher Company of California* (R. 13).

On March 16, 1928, the Board granted respondent's (the Commissioner of Internal Revenue) *ex parte* motion to limit the issues on special assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1921, to the issues defined in subdivisions (a) and (b) of Rule 62 of the Board (R. 11-12).

On October 2, 1928, the Board promulgated its combined findings of fact, opinion, and decision in the three cases (R. 13-32). So far as this appellant is concerned the Board denied all errors and sustained the Commissioner of Internal Revenue in his determination of a deficiency in tax of \$20,210.94 for the period February 16 to December 31, 1921.

II. FACTS.

The facts, so far as they are material to the assignments of error, are as follows:

L. J. Christopher (individual) entered the wholesale and retail ice cream, candy, and confectionery business in 1887 at Los Angeles, California, with a capital of approximately \$50,000. The business was successful and steadily increased in value. In 1912 he registered his name as a trade mark. Prior to 1914 he had

acquired certain real estate and had built thereon an extensive plant. The sales grew in volume and by 1914 he was selling ice cream in many of the surrounding towns and cities, his annual sales being approximately 200,000 gallons. In 1914 he organized the L. J. Christopher Company of California, under the laws of California, with a capital stock of \$400,300 and transferred to it all of the assets of his business including the good will, in consideration of receipt of all its capital stock except a few qualifying shares (R. 14-15).

On June 1, 1914, The California Company set up on its books a statement of the assets and liabilities acquired from L. J. Christopher. It entered its capital stock of \$400,300 among the liabilities and then made a balancing entry "Good Will—\$17,028.82" among the assets (R. 15-16). It continued in the business until 1921.

In February, 1921, the L. J. Christopher Company of Delaware (appellant) was organized under the laws of Delaware and immediately acquired for \$125,000 cash and \$125,000 par of stock, the ice cream, candy and confectionery business of the California Company including "all that certain personal property consisting of the stock of goods, wares, and merchandise, materials, manufactured articles, machinery, trucks equipment, and all personal property owned by the vendor herein and which is now in and about those certain premises heretofore operated by said vendor on Lots 1, 2, 3, 9, 10, and 11, of Tract No. 2651, in Los Angeles City, and all property, including good will, owned by said vendor, save and except real estate (including buildings) and cash (including bills and accounts of every kind outstanding)." (R. 20.)

Appellant (the Delaware Company) filed a timely income tax return for the period February 16 to

December 31, 1921 (R. 6). In auditing said return the Commissioner of Internal Revenue determined the net income for the period to be \$124,073.53 and the invested capital to be \$279,745.85. Said invested capital was determined on the basis of the par value of the stock issued and retired during the year pro-rated for the time effective (R. 21). The Commissioner thus arrived at a deficiency in tax of \$20,210.94 (R. 7) and notified appellant of same by letter mailed April 24, 1926 (R. 23).

At the trial of the case the Commissioner of Internal Revenue offered in evidence a so-called waiver (a true photo-lithograph copy of which appears in the record opposite page 42), in order to prove that his deficiency letter was timely. Said waiver was signed on behalf of appellant by S. C. Hookstratten as secretary and bore date of February 19, 1926, stamped on it. Said waiver was not signed by the Commissioner of Internal Revenue but the name of D. H. Blair, Commissioner, had been written thereon by some one else who placed his initials "L. G." thereunder. S. C. Hookstratten had no authority as secretary to sign said waiver and was not authorized by the Board of Directors to do so (R. 39-42).

Petitioner objected to the introduction of said waiver in evidence for the reason that it was signed only by the secretary and not by the president of the corporation; that the secretary was not authorized to sign it; and that it was not signed by the Commissioner of Internal Revenue. Said objection was overruled by the Board and the waiver was admitted as respondent's Exhibit "D" and an exception to the ruling noted (R. 41-2).

In its decision the Board held that there was no abnormality in income or invested capital; that it was

not impossible to determine appellant's invested capital; that there was no evidence to the effect that appellant acquired for stock a mixed aggregate of tangible and intangible assets, the respective values of which could not be determined; and that appellant was not entitled to the benefit of Section 328 of the Revenue Act of 1921 (R. 31). It also held that assessment of the deficiency was not barred at the time the deficiency letter was mailed (R. 28).

III. ASSIGNMENTS OF ERROR.

The petition for review contains the following assignments of error:

1. The Board of Tax Appeals erred in admitting the waiver in evidence.

2. The Board of Tax Appeals erred in holding that there was no evidence as to when the return of petitioner was filed.

3. The Board of Tax Appeals erred in holding that the proposed deficiency was not barred by the statute of limitations.

4. The Board of Tax Appeals erred in holding that the petitioner was not entitled to the benefits of the provisions of Section 328 of the Revenue Act of 1921.

IV. QUESTIONS PRESENTED.

The questions presented by the assignments of error are as follows:

1. Was assessment of the proposed deficiency in tax barred by the statute of limitations at the time the deficiency letter was mailed to appellant on April 24, 1926?

2. Was appellant entitled to have its profits tax

computed under the provisions of Sections 327 and 328 of the Revenue Act of 1921?

V. ARGUMENT.

The foregoing questions will now be discussed in the order stated.

1. Was assessment of the proposed deficiency in tax barred by the statute of limitations at the time the deficiency letter was mailed to appellant on April 24, 1926?

Section 250(d) of the Revenue Act of 1921 provides as follows:

“The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after return was filed, * * * unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax.”

Appellant filed an income tax return for the period February 16 to December 31, 1921. This is evidenced by the statement in the deficiency letter, “an audit of your income and profits tax return for the period February 16 to December 31, 1921,” etc. (page 6 of printed record).

The date for filing said return is fixed by Sections 241 and 227 of the Revenue Act of 1921, as on or before March 15, 1922.

It is a rule of law that when a date is fixed by statute for the filing of a document, and such document is filed, the presumption is that it was filed on time, in the

absence of any evidence to the contrary. This presumption arises from the fact that

“Men are presumed to have acted legally and properly rather than otherwise, etc. * * *.” (Section 48, Jones on Evidence, Civil Cases, 3d Edition.)

Again—

“The presumption is that the provisions of law have been complied with by the officers (of a corporation); not that they have been violated.” (Section 55, Jones on Evidence, Civil Cases, 3d Edition.)

It therefore appears that in accordance with the rule of evidence in effect as cited above, the Court must presume that the return was filed on or before March 15, 1922, as provided by law. This presumption is very much strengthened by the fact that the Commissioner, although having said return in his custody and possession, failed to produce it at the trial in order to show the filing date, and failed to offer any explanation as to why it was not produced. The only logical conclusion is that if it bore a date of filing subsequent to the date provided by law and within four years of the date of the deficiency letter, he would undoubtedly have produced it and offered it in evidence to prove such fact.

That the return was filed on time as provided by law must be presumed from the fact that the Commissioner has not asserted a delinquency penalty. This presumption arises from the fact that official acts are presumed to be regular and according to law.

“The presumption of the regularity of official acts not only embraces judicial acts but also those

of other officers. Naturally the presumption has less weight, and hence it is more easily rebutted when applied to acts in non-judicial proceedings; but in each case the principle is the same; namely that, when an official act is shown to have been substantially regular, it is presumed that the formal requisites were also performed." (Section 41, Jones on Evidence, Civil Cases, 3d Edition.)

"The maxim, *omnia praesumuntur rite et solenniter esse acta*, does not depend alone on the ground that the official act is performed by an officer who has taken the oath of office, though undoubtedly this is one of the considerations which support the presumption of regularity in such cases; and we find the statement constantly recurring in judicial decisions that sworn public officials are presumed to have performed their duties properly, in the absence of evidence to the contrary. The presumption has been applied to acts of officers of almost every class and a few illustrations will sufficiently illustrate the rule." (Section 45, Jones on Evidence, Civil Cases, 3d Edition.)

The Commissioner introduced in evidence a so-called waiver, consenting to the assessment of any deficiency for the year 1921, up to December 31, 1926. It is apparent that he relies on this waiver as his authority to assess the alleged deficiency, else he would not have introduced it. This fact further supports the presumption that the return was filed on time.

"The mere withholding or failing to produce evidence, which under the circumstances would be expected to be produced and which is available, gives rise to a presumption against the party. It is a presumption less violent than that which attends the fabrication of testimony or the suppression of documents in which other parties have a legal interest; but the courts recognize and act upon the natural inference that the evidence is

held back under such circumstances because it would be unfavorable. Said Lord Mansfield: 'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted.'" (Section 19, Jones on Evidence, Civil Cases, 3d Edition.)

In *Robinson v. Union Central Life Insurance Company*, 144 Fed. 1005, this principle is enunciated:

"3. Evidence—Presumption From Failure to Produce. Where evidence is open to two interpretations, and it is within the exclusive power of one party to show what the truth is, the failure of such party to produce the evidence will authorize the jury to presume that, if produced, it would be unfavorable to him."

The books are full of cases in point. It therefore appears from the record that the return was filed on or before March 15, 1922, and that the period in which to assess any deficiency expired March 15, 1926, prior to the issuance of the deficiency letter, unless the said waiver was valid and timely.

The deficiency letter was mailed to appellant April 24, 1926, more than four years after March 15, 1922, the filing date of the return. It is obvious that unless this waiver is good, the deficiency letter came too late.

Section 250(d) (*supra*) provides that assessment of a 1921 tax can be deferred beyond four years from the filing date of the return *only when the Commissioner and the taxpayer consent in writing thereto*. Is the so-called waiver offered by the Commissioner (and the only evidence offered by him) such a consent in writing?

Consent is more than acquiescence. The following definition appears in 12 C. J. 519:

“The term (consent) implies the power to authorize and to prevent, a degree of superiority which arises from the presence of a combined mental and physical ability to act; it also implies not merely that a person accedes to, but authorizes an act.”

A corporation acts through duly authorized agents. If appellant acted in signing the waiver in question (opposite p. 42 of record), it was through S. C. Hookstratten, its secretary-treasurer, because his is the only name on the waiver of any one purporting to represent appellant.

Mr. Hookstratten was *a witness on behalf of the Commissioner* (respondent) (see page 41 of printed record). He testified that he signed his name to said waiver as secretary-treasurer but on further questioning by appellant's attorney he stated that his duties as such officer were to take care of the records and books and to do the things that the Board of Directors and the Executive Committee authorized him to do and *that the Board of Directors did not authorize him to sign said waiver* (R. 41-42). The Commissioner is bound by the testimony of *his own* witness and from this it is apparent that Mr. Hookstratten was not authorized to sign said waiver. Therefore appellant was not and is not bound by his act. Hence, the waiver is not the consent of appellant unless it be shown that appellant subsequently ratified the act of Mr. Hookstratten and no such showing had been made and none even attempted by the Commissioner.

The name “D. H. Blair,” Commissioner, appears on the so-called waiver and under it the initials “L. G.”

It is apparent that the Commissioner did not personally sign the waiver and there is no showing that he authorized any one else to do so. Likewise there is no showing as to who did sign his name or when it was done. Under such circumstances there can be no presumption that the Commissioner "consented" in writing or otherwise to the extension of time for assessment provided in said so-called waiver.

There is no evidence that the Commissioner ever ratified the act of the unknown person who signed his name, unless it be argued that the deficiency letter mailed on April 24, 1926, carries an implied ratification. This would mean that the Commissioner "consented" after the statute barred assessment. A waiver or consent executed after the statute bars assessment is void. *Joy Floral Co. v. Commissioner of Internal Revenue*, 29 Fed. (2d) 865, decided by this Court December 3, 1928. To the same effect is the decision of the U. S. Circuit Court of Appeals for the Second Circuit in *Greylock Mills v. Commissioner of Internal Revenue*, 31 Fed. (2d) 655, on which the U. S. Supreme Court denied certiorari.

How can the so-called waiver be a "consent in writing" of the Commissioner and the taxpayer, when neither authorized its signature, when there is no showing that either consented even orally to it, when there is no showing of subsequent ratification, and when an implied ratification on the part of the Commissioner comes too late and is self-serving?

The Commissioner of Internal Revenue can not plead estoppel against appellant because the so-called waiver is the printed form of the Treasury Department and at the bottom has this provision:

"If this waiver is executed on behalf of a cor-

poration, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation," etc.

This is merely an application of the fundamental rule of law that any one dealing with a corporation deals at his peril, in that he assumes the burden of ascertaining that the agent or officer with whom he deals is duly authorized. *Then certainly the Commissioner can not be heard to complain when he puts such officer or agent on the stand as his own witness and he testifies that he was not authorized.*

The first assignment of error is that the Board erred in admitting the waiver in evidence. If the waiver was not signed by any one authorized by either the Commissioner or the taxpayer (as appears from the foregoing) certainly it was not their "consent in writing" and would be incompetent to bind the parties and irrelevant and immaterial to the issues in this case. It is therefore submitted that the Board erred in admitting the waiver in evidence. But even though it was admitted, the objection still stands that since it is not the "consent in writing" of either of the parties hereto it is of no effect whatever.

In *Chadbourne & Moore v. Commissioner of Internal Revenue*, 16 B. T. A. 961, the validity of certain waivers was before the Board and it held that a waiver *not executed by the Commissioner nor on his behalf was of no effect*. Since there is a positive showing that the instant waiver was not executed by the Commissioner and since there is no showing that it was executed on his behalf by any one having authority, and since no ratification prior to the expiration of the statutory period for assessment has been shown, it would seem that the so-called waiver is of no effect.

At the beginning of the trial in this case before the Board of Tax Appeals, appellant moved for and was granted leave to amend its petition by raising the question of the statute of limitations and at that time called attention to the fact that the deficiency letter was mailed on April 24, 1926, *more than four years after the filing of the return* (R. 10-11). The Commissioner did not plead to this amendment and allegation until after appellant's testimony was all in and after it had closed its case (R. 39). Then the Commissioner (respondent) entered a general denial, at a time when appellant had no opportunity to offer proof in support of the allegations in the amendment. The Board in its opinion stated that

“there is no evidence in the record as to when the income and profits tax return was filed”

and predicated its decision on this statement.

Section 907(a) of the Revenue Act of 1926, which was in effect at the time the Board heard the case, provides:

“The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia.”

Rule 29 of the Equity Rules of the D. C. Supreme Court provides as follows:

“Averments other than of value or amount of damage, if not denied, shall be deemed confessed.”

In view of the foregoing, the Board should not be heard to say that there is no evidence as to when the

return was filed,—*when it permitted the Commissioner's answer denying the allegation after appellant (petitioner) had closed its case.*

Wherefore, it is submitted that the Board of Tax Appeals erred in admitting in evidence the said waiver, in holding that there was no evidence as to when the return was filed, and in holding that assessment and collection of the tax was not barred on April 24, 1926, the date on which the deficiency letter was mailed to appellant.

2. Was appellant entitled to have its profits tax computed under the provisions of Sections 327 and 328 of the Revenue Act of 1921?

On March 16, 1928, the Commissioner of Internal Revenue filed with the Board a motion to limit the hearing in this case to the issues defined in subdivisions (a) and (b) of Rule 62 of the Board (R. 11-12). Said motion was granted by the Board on March 16, 1928 (R. 12).

Subdivisions (a) and (b) of Rule 62 of the Board, in effect at that time, were as follows:

“(a) If some of the issues raised by the petition involve section 327 or section 328 of the Revenue Act of 1918, or of 1921 (or section 210 of the Revenue Act of 1917, as the case may be), and some do not involve such sections, the hearing may, in the discretion of the Board, on motion, be limited in the first instance to trial of the issues which do not involve such sections.

“(b) After decision on such other issues, or if no such other issues are raised by the pleadings, a hearing may, in the discretion of the Board, on motion, be had, limited to the trial of the issue whether the petitioner is entitled to have its tax

determined as provided in Section 328 (or section 210, as the case may be)."

At the commencement of the trial on April 17, 1928, appellant obtained leave to and amended its petition by raising a new issue which did not involve Section 327 and 328 of the Revenue Act, but the aforesaid motion of the Commissioner was not withdrawn and stood as granted by the Board. Under this procedure and the provisions of subdivision (a) of Rule 62 (*supra*), appellant offered no evidence upon the question of its right to the provisions of Sections 327 and 328 in computing its profits tax liability,—except such incidental facts as were necessary to complete the chain of evidence in the other two cases which were consolidated for trial and heard along with this case.

In its opinion the Board states (top p. 31 of record):

"While the bill of sale recites that the good will of California Company was a part of the assets sold to the Delaware Company (this appellant) there is no evidence in the record which in any way shows the value of such good will, if indeed it had any value."

Again the Board says (R. 31):

"The value of the good will acquired by Delaware Company could easily have been proven if such value indeed existed," etc.

Again the Board recites that there was no evidence in the record to the effect that appellant's invested capital could not be determined, and no evidence that the respective values of the mixed aggregate of tangible and intangible property acquired with stock and cash

could not be determined, and no proof of abnormal conditions. (R. 31, sec. par.)

Of course, there was no proof or evidence in support of appellant's allegations, when the Board by granting the Commissioner's motion closed the doors to proof upon such under Rule 62(a) (*supra*). *Appellant made no attempt to prove because it understood from the rules that it would have an opportunity after the other issues were decided.* If the statute of limitations question is decided favorably, there will be no occasion for proof on the other question. But it is submitted that appellant has not yet had its day in court on the issues involving Sections 327 and 328 of the 1921 Act.

Certainly it was error for the Board to hold that appellant was not entitled to the provisions of Section 327 and 328, *when it had denied appellant the opportunity to prove its right.* It is therefore submitted that this Court should remand the case to the Board for further proceedings on this issue, unless the Court agrees with appellant on the waiver question discussed above, in which case the deficiency will be eliminated, or unless the Court can determine from the statement of facts in the fore part of this brief (which are only such facts as were incident to the proof in the other two cases tried at the same time) that appellant is and was entitled to the provisions of Sections 327 and 328 of the Act.

Sections 327 and 328 of the Revenue Act of 1921 are as follows:

“Sec. 327. That in the following cases the tax shall be determined as provided in section 328:

“(a) Where the commissioner is unable to determine the invested capital as provided in section 326;

* * * * *

“(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds respectively;

“(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital,

* * * * *

“Sec. 328. (a) That in the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of \$3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of \$3,000) for such year.

* * * * *

“In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business

transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.''

While no attempt will be made here to argue from the facts set out above that appellant is entitled to the provisions of Section 327 and 328, it is believed that the Court will have no difficulty in reaching the conclusion that appellant can, when opportunity is afforded, prove facts sufficient to entitle it to the provisions sought. The Court can see from the record in this case and the two companion cases now before it that appellant did acquire a mixed aggregate of tangible and intangible assets for stock and cash, that the Commissioner computed its invested capital by taking the par value of the stock issued to appellant and others and paid no attention to the real basis for computing invested capital contained in the provisions of Section 326 of the Act,—that is, the provisions as to computation of what is called statutory invested capital. And the Court can easily judge that an income of \$124,073.53 in 10½ months on an invested capital of only \$279,745.85 is out of all proportion to normal business and that such a condition has possibilities of proof of a very abnormal condition in invested capital and income when the opportunity is offered.

If the question of the Court's right to consider a special assessment case should be suggested, the Court's attention is directed to the opinion of the U. S. Circuit Court of Appeals for the 7th Circuit rendered October 24, 1930, in *Ryan Car Company v. Commissioner of Internal Revenue*. (Not yet reported but published at Par. 1835 in Prentice-Hall, Inc., 1930 Federal Tax Service.)

Wherefore, it is submitted that the Board of Tax

Appeals erred in holding that appellant was and is not entitled to have its profits tax computed under the provisions of Sections 327 and 328 of the Revenue Act of 1921 and appellant prays this Honorable Court either to reverse the said holding of the Board and to remand the case with instructions to the Board to compute the profits tax under the provisions of said sections, or to remand the case with instructions to the Board to afford appellant the opportunity to prove the facts necessary to substantiate its right to said provisions.

CONCLUSION.

Two main questions have been presented and discussed. If the first is decided favorably to appellant, the second becomes immaterial because the tax will be extinguished. But if the first is decided adversely, then the second becomes quite material and appellant desires the benefit of the provisions of Sections 327 and 328.

In view of all the foregoing, it is respectfully submitted that appellant's prayer should be granted.

Respectfully submitted,

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COURT OF APPEALS,
DISTRICT OF COLUMBIA
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No. 5236

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In the Court of Appeals of the District of
Columbia

OCTOBER TERM, 1931

L. J. CHRISTOPHER COMPANY OF DELAWARE,
APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE, APPELLEE

APPEAL FROM THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR APPELLEE

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COMMISSIONER OF INTERNAL REVENUE, APPELLEE

*APPEAL FROM THE UNITED STATES BOARD OF TAX
APPEALS*

BRIEF FOR APPELLEE

PREVIOUS OPINION IN THE PRESENT CASE

The only previous opinion is that of the United States Board of Tax Appeals (R. 23-32), which is reported in 13 B. T. A. 729.

JURISDICTION

This appeal involves income and profits taxes for the year 1921 in the amount of \$20,210.94 and is taken from an order of redetermination of the United States Board of Tax Appeals entered Feb-

ruary 15, 1929. (R. 32.) The case is brought to this court by petition for review filed August 14, 1929 (R. 34), pursuant to stipulation (R. 33), and to the Revenue Act of 1926, c. 27, Sections 1001, 1002, and 1003, 44 Stat. 9, 109-110.

QUESTIONS PRESENTED

1. Whether or not the deficiency here asserted is barred by the statute of limitations.

2. Whether in the absence of fraud or other irregularity a Circuit Court of Appeals may review a decision of the Board of Tax Appeals sustaining a determination by the Commissioner of Internal Revenue that the appellant was not entitled to have its profits taxes determined especially under Sections 327-328 of the Revenue Act of 1921.

STATUTES AND RULES INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227:

SEC. 250(d). The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 * * * shall be determined and assessed by the Commissioner within four years after the return was filed, * * * unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; * * *.

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

* * * *

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis

from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) That in the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of \$3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of \$3,000) for such year. In the case of a foreign corporation or of a corporation entitled to the benefits of section 262 the tax shall be computed without deducting the specific exemption of \$3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations pre-

scribed by him with the approval of the Secretary.

Rules of the Board of Tax Appeals:

RULE 62.—SPECIAL ASSESSMENT

(a) If some of the issues raised by the petition involve section 327 or section 328 of the Revenue Act of 1918 or of 1921 (or section 210 of the Revenue Act of 1917, as the case may be), and some do not involve such sections, the hearing may, in the discretion of the Board, on motion, be limited in the first instance to trial of the issues which do not involve such sections.

(b) After decision on such other issues, or if no such other issues are raised by the pleadings, a hearing may, in the discretion of the Board, on motion, be had, limited to the trial of the issue whether the petitioner is entitled to have its tax determined as provided in section 328 (or section 210, as the case may be).

STATEMENT OF FACTS

The facts are not in dispute and may be summarized as follows:

Appellant is a Delaware corporation organized in February, 1921, at which time it acquired for \$125,000 cash and 1,250 shares of its 7% preferred stock, par value \$100 each, the assets listed in the following bill of sale (R. 20):

For a valuable consideration, receipt of which is hereby acknowledged, L. J. Chris-

topher Company, a corporation, organized and existing under and by virtue of the laws of the State of California, hereinafter referred to as the vendor, of the one part, hereby grants, conveys, and assigns to L. J. Christopher Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, hereinafter referred to as the vendee of the other part, all that certain personal property consisting of the stock of goods, wares, and merchandise, materials, manufactured articles, machinery, trucks, equipment, and all personal property owned by the vendor herein and which is now in and about those certain premises heretofore operated by said vendor on Lots 1, 2, 3, 9, 10, and 11, of Tract No. 2651, in Los Angeles City, and all property, including good will, owned by said vendor, save and except real estate (including buildings) and cash (including bills and accounts of every kind outstanding). It is understood and agreed between said parties that all of the said properties are free from encumbrances.

L. J. CHRISTOPHER Co.,

A California Corporation.

By L. J. CHRISTOPHER, *President.*

ALFRED BEAUDRY, *Secretary.*

Appellee computed appellant's income for the taxable year 1921 to be \$124,073.53 and its invested capital, \$279,745.85. The latter figure is determined as follows: Capital stock, \$275,000; plus additions, \$14,626, issued on March 31, 1921, pro rated

for 276 days, \$11,059.65. Stock, par value \$220, issued on September 30, 1921, pro rated for 93 days, \$56.05. Total, \$286,115.70. Reductions on account of 250 shares of preferred stock redeemed on September 30, 1921, pro rated for 93 days, \$6,369.85. (R. 21.)

The deficiency letter involved in this appeal was mailed by the appellee on April 24, 1926. (R. 6.) Appellant filed with appellee an Income and Profits Tax Waiver (R. 22-23) extending the period for the assessment of income and profits taxes for the taxable year 1921 to December 31, 1926. St. Cuir Hookstratten, who signed the waiver in behalf of the appellant, has been continuously its Secretary-Treasurer since some time in 1921. The waiver was subscribed and sworn to February 13, 1926 (R. 23), and stamped as received by appellee February 19, 1926 (copy opposite R. 42).

The Board determined that the deficiency was not barred and that appellant was not entitled to have its taxes computed under the provisions of Sections 327-328 of the Revenue Act of 1921. From that determination appellant has taken this appeal.

SUMMARY OF ARGUMENT

The waiver was valid and of binding effect to extend the statutory period for assessment. That it was signed after the statutory period had run is not material, nor is the waiver defective because not personally signed by the Commissioner. The

appellant may not now escape the binding effect of the waiver by alleging that the Secretary-Treasurer had no authority from the board of directors to sign it. Corporations are bound by the acts of their regularly constituted officers acting within the scope of their authority, and the courts have under these circumstances extended every presumption in favor of the validity of a waiver.

The Supreme Court of the United States has decided that a decision of the Board of Tax Appeals involving special assessment of profits taxes is not subject to review in the absence of fraud or other irregularity. Petitioner has allowed any irregularity here to pass unchallenged and is not now in a position to assert it.

ARGUMENT

I

The waiver was effective to extend the period for assessment

Appellant urges that the proposed deficiency is barred by the statute of limitations and attacks the validity and effectiveness of the waiver on several grounds. The return was due to be filed on or before March 15, 1922. (Section 241 (a).) The filing date is not shown in the record. Assuming that the return was timely filed, the limitation period expired March 15, 1926. (Section 250 (d).) Hence, unless the waiver was valid, the proposed deficiency asserted in the letter of April 24, 1926, is barred. The appellant's contentions are taken up separately:

(a) That a waiver executed after the statutory period for assessment is void.

Appellant pleaded the bar of the statute but its failure to prove the date when the return was filed destroyed its *prima facie* case. The point, however, is not material in view of the fact that the validity and effectiveness of a waiver executed after the statutory period has been upheld by the Supreme Court. *Stange v. United States*, 282 U. S. 270; *Burnet v. Railway Equipment Co.*, 282 U. S. 295; *Brown & Sons Co. v. Burnet*, 282 U. S. 283; *Aiken v. Burnet*, 282 U. S. 277.

(b) That the waiver was not personally signed by the Commissioner and no showing was made that he authorized some one else to sign for him.

The courts have without exception applied to this situation the presumption in favor of the regularity and validity of the acts of a public official. In *United Thacker Coal Co. v. Commissioner* (C. C. A. 1st), 46 F. (2d) 231, the court said (p. 233):

The Commissioner is presumed to discharge his official duties in a proper and legal manner; and, in this case, if it was essential that the Commissioner should have directed the placing of the signature upon each waiver, this is presumed to have been done in the absence of the evidence to the contrary, for public officials are presumed to act correctly and in accordance with the law.

The same principle was applied in the following cases: *Trustees for Ohio & Big Sandy Coal Co. v. Commissioner* (C. C. A. 4th), 43 F. (2d) 782; *Stern*

Brothers & Co. v. Burnet (C. C. A. 8th), decided July 13, 1931, Prentice-all Federal Tax Service, 1931, p. 1981; *Pantages Theatre Co. v. Lucas* (C. C. A. 9th), 42 F. (2d) 810; *Greylock Mills v. Commissioner* (C. C. A. 2nd), 31 F. (2d) 655; certiorari denied, 280 U. S. 566; *John M. Parker Co. v. Commissioner* (C. C. A. 5th), 49 F. (2d) 254; *Diamond Alkali Co. v. Heiner* (W. D. Pa.), 39 F. (2d) 645; *Marshall Wells Co. v. Willcuts* (Minn.), 41 F. (2d) 751. In *Florsheim Bros. Co. v. United States*, 280 U. S. 453, the Supreme Court held that waivers are not contracts. The Commissioner's signature thereto was required purely for administrative purposes. *Burnet v. Railway Equipment Co.*, *supra*. The provision for the Commissioner's consent is therefore at most directory only, and a complete omission of his signature would not be a defect of such a character as to defeat the tax. *Greylock Mills v. Commissioner*, *supra*.

(c) That the Secretary-Treasurer had no authority from the appellant's board of directors to sign the waiver.

The general rule is that corporations are bound by the acts of their regularly constituted officers acting within the scope of their authority. Thompson on Corporations (3d Ed.) Vol. 2, Sec. 1518; Vol. 3, Secs. 1625, 1670. Mr. Hookstratten was the Secretary-Treasurer of the corporation continuously from some time in 1921. As secretary he was one of the general managing agents of the corporation (*Hastings v. B. L. Ins. Co.*, 138 N. Y.

473) ; as Treasurer he was the corporation's fiscal agent or officer. It is submitted that the signing of the waiver was an act falling within the scope of the ordinary duties of the position of Secretary-Treasurer. *Liberty Baking Co. v. Heiner* (C. C. A. 3d), 37 F. (2d) 703; *Independent I. & C. Storage Co. v. Commissioner* (C. C. A. 5th), 50 F. (2d) 31; *Hammond v. Carthage Sulphite Pulp & Paper Co.* (N. D. N. Y.), 34 F. (2d) 155. While it is true that a Secretary-Treasurer can not, without express authority from the board of directors, bind a corporation by contract in cases such as the sale, lease, or transfer of property, cancellation or compromise of indebtedness, it would seem that such prohibition would not apply to a waiver since a waiver is not a contract but merely a consent. The signature to a waiver need not therefore be hedged about with the legal rules governing contracts. *Loewer Realty Co. v. Anderson* (C. C. A. 2nd), 31 F. (2d) 268. By appointing Hookstratten to the position of Secretary-Treasurer the board of directors impliedly conferred upon him authority to act for it upon matters within the scope of that office. Taxpayer can not now claim that the performance of one particular act which was within the scope of his powers required the specific authority of the board. *Stevens v. Selma Fruit Co., Inc.*, 18 Cal. App. 242; *Appeal of American Feature Film Co.*, 11 B. T. A. 1271. The board of directors of the corporation acts as a body in managing the corporate affairs, but a tax waiver signed by one, an

authorized corporate officer, is sufficient. *Commissioner v. Godfrey* (C. C. A. 2nd), 50 F. (2d) 79. It has been held that where a waiver was signed by an officer who subsequently contends that he had no authority to sign, a claim of equitable estoppel may be successfully interposed (*Lucas v. Hunt* (C. C. A. 5th), 45 F. (2d) 781), and, in a case where there was no showing that the other directors protested against the execution of a waiver by the President and Secretary of the board of directors, it was proper to indulge the presumption that there was acquiescence by the board. *United States v. Kemp* (C. C. A. 5th), 12 F. (2d) 7, certiorari denied, 273 U. S. 703.

It is submitted that the waiver was valid and effective to extend the statutory period for assessment.

II

The decision of the Board of Tax Appeals involving special assessment of profits taxes is not subject to review

The Supreme Court of the United States has decided that such cases are not subject to review. *Enameled Metals Co. v. Commissioner*, 283 U. S. —, April 27, 1931, affirming *per curiam* the decision of the United States Circuit Court of Appeals for the Third Circuit, 42 F. (2d) 213. This court so held in *Railway Supply Co. v. Burnet*, decided June 29, 1931.

Appellant complains that it has not yet had its day in court on the question of special assessment.

The only issue raised by the original petition was whether appellant was entitled to special assessment. On March 16, 1928, a month before the hearing, appellee filed a motion under Rule 62 of the Board of Tax Appeals. Since no other issues were raised by the pleadings, the motion limited the hearing to a trial of the single issue whether the appellant was entitled to the benefit of Sections 327 and 328. The motion was granted March 16, 1928. (R. 12.) At the hearing appellant offered two amendments to the original petition raising issues not related to the special-assessment issue, and these the Board allowed. (R. 10, 11.) The situation then became the same as if the original petition had contained issues involving Sections 327 and 328, together with issues not involving such sections, and the effect of appellee's motion was to limit the hearing in the first instance "to trial of the issues which do not involve such sections." Rule 62 (a). After decision on such other issues the appellant had the right to a hearing on the special assessment issue. This is provided for under subdivision (b), which reads in part:

After decision on such other issues,
 * * * a hearing may, * * * on motion, be had, limited to the trial of the issue whether the petitioner is entitled to have its tax determined as provided in section 328 * * *.

Appellant urges that the effect of appellee's motion was to limit the hearing to issues other than the special-assessment issue and that the Board

was therefore in error in prematurely deciding the special-assessment issue. This contention appears to be correct, but it must be pointed out that the Board promulgated its decision October 2, 1928, and entered its final order of redetermination February 15, 1929 (R. 32), and that the record discloses no motion by the appellant after decision to have its claim to special assessment tried. It is also significant that the Docket Entries on page 2 of the record show that after notice of settlement was filed by the General Counsel for the appellee on January 15, 1929, appellant submitted to the Board an alterative redetermination on February 5, 1929, and that a hearing was had on February 13, 1929, before Board Member Milliken on the contested settlement under Rule 50. Appellant did not take advantage of the opportunity afforded by the hearing to call attention to the Board's oversight. Having failed to avail itself of the rights extended by the rules, appellant may not now be heard to complain. It is elementary that the errors to be reviewable must have been definitely called to the trial court's attention in order that the trial court be afforded fair opportunity to pass on the matter and correct its errors, if any. *Monument Pottery Co. v. Imperial Coal Corp.* (C. C. A. 3d), 21 F. (2d) 683, certiorari denied, 276 U. S. 618; *United States v. National City Bank of New York* (C. C. A. 2nd), 281 Fed. 754; *Arkansas Bridge Co. v. Kelly-Atkinson Const. Co.* (C. C. A. 8th), 282 Fed. 802. This court in *Carson v. Jack-*

son, 281 Fed. 411, had occasion to restate the requirement that a party shall make objections and exceptions in the court below in order to rely on the alleged errors on appeal. It is submitted that this rule is applicable in this case.

It is assumed that the action of the Board here complained of was due to an oversight. We do not attempt to defend the action of the Board but we do rely upon the rule that a litigant must seek to correct errors in the trial court before invoking the revisory power of an appellate court.

CONCLUSION

The waiver was valid to extend the statutory period for assessment and this court has ruled that special-assessment determinations by the Board may not be reviewed. It is submitted that the appeal should be dismissed.

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SEPTEMBER, 1931.